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TESTIMONY OF SCOTT J. SANDLER, ESQ.
CONCERNING RAISED BILL NO. 6662
AN ACT CONCERNING THE RECOUPMENT OF MONEYS OWED TO A UNIT OWNERS' ASSOCIATION DUE TO NONPAYMENT OF ASSESSMENTS

I. SUMMARY OF TESTIMONY:

Raised Bill No. 6662 is designed to protect the associations of common interest communities and the owners living in these communities. The bill would make it possible for associations to collect a greater portion unpaid assessments owed by delinquent owners through the foreclosure process.

For the reasons set forth below, the Connecticut General Assembly should revise and adopt Raised Bill No. 6662.

II. BIOGRAPHY OF SCOTT J. SANDLER:

Mr. Sandler is a graduate of the State University of New York at Albany (B.A., Economics, 1997) and Quinnipiac College School of Law (J.D., 2000). He was an Associate Editor of the Quinnipiac Law Review.

Mr. Sandler is a member of the American Bar Association, the Connecticut Bar Association and the Hartford County Bar Association. He is also a member of the Executive Committee of the Real Property Section of the Connecticut Bar Association.

Since 2001, Mr. Sandler has focused on representing condominium, community and homeowners associations.

Mr. Sandler is a past President of the Connecticut Chapter of the Community Associations Institute. He is presently the Chairman of the Chapter's Legislative Action Committee.

Mr. Sandler is a partner in the law firm of Perlstein, Sandler & McCracken, LLC, in Farmington, Connecticut, which currently provides legal services to approximately 450 condominium and homeowner associations throughout the State.

III. ANALYSIS:

The General Assembly SHOULD revise and adopt Raised Bill No. 6662.

Raised Bill No. 6662 was introduced to better protect community associations and their members. The bill is designed to allow associations to collect more of the unpaid assessments owed by a delinquent unit owner, through the foreclosure process.

A. Association liens enjoy a limited priority over first and second mortgages on units.

All community associations in Connecticut are governed, at least in part, by the Connecticut Common Interest Ownership Act ("CIOA"). CIOA is largely based on the Uniform Common Interest Ownership Act ("UCIOA").

Section 47-258 of CIOA presently provides that unpaid assessments levied by an association against a unit constitute a lien on that unit.

Under Subsection 47-258(b) of CIOA, the association's lien enjoys complete priority over all other liens and encumbrances on the unit, except for the following:

1. Real estate taxes and assessments;

2. Liens and encumbrances recorded prior to the creation of the community; and

3. A first and second mortgage on the unit.

Subsection 47-258(b) further provides the association's lien is prior to a first or second mortgage, in an amount equal to the common expenses that accrued during the six months prior to an action to enforce either the association's lien or the first or second mortgage. In other words, the association's lien enjoys a limited priority over the first and second mortgage, and Subsection 47-258(b) provides a method of calculating the amount of that priority.

B. The priority lien provides protections for associations and the unit owners.

Associations perform necessary functions for their communities. They maintain the infrastructure and, typically, the buildings in which the units are located. They insure the common property and, in most communities, the units as well.

Associations raise the funds necessary to perform these functions through assessments levied against the units. Typically, these assessments are an association's only source of income. When an owner fails to pay the assessment, the association can only look to the other owners to make up the lost revenue.

This issue is discussed at length in a law review article titled Meaner Lienor Community Associations: The "Super Priority" Lien and Related Reforms Under the Uniform Common Interest Ownership Act, by James L. Winokur, 27 Lake Forest L. Rev. 353 (1992), attached hereto as Exhibit A. Mr. Winokur observed as follows:

> In carrying out their crucial responsibilities for preservation and maintenance of community infrastructure and common assets such as building exteriors, associations vary greatly as to their financial strength, and the financial and personal management experience of their elected officers. The main source of financial and interpersonal strain on association boards is the association's inability to collect unpaid assessments.

Mr. Winokur also observed as follows:

> [A]ssociations typically compete unsuccessfully for foreclosure sale proceeds with lenders who hold mortgages on [Common Interest Community] units. Typically, the foreclosure sale bid will be equal to no more than the foreclosing lender's debt, leaving no foreclosure sale proceeds remaining to pay any of the association's lien. In a weak market, where the unit's value would be lower than the amount of the senior mortgage, the association's junior priority is particularly devastating. Since any assessment lien foreclosure purchaser would have to buy subject to a mortgagee lien greater than the entire current property value, foreclosure of the junior association lien becomes a worthless remedy.

Mr. Winokur stated, "To further support collection of [Common Interest Community] assessments, the UCIOA creates a ***perpetually renewable*** association lien . . . ." [Emphasis added].

Mr. Winokur discusses the relationship between associations and mortgage lenders as follows:

> When a homeowner defaults on a mortgage loan outside community association developments, the lender assumes substantial financial responsibility for the property. At least pending foreclosure, the lender -- who will likely own the home after foreclosure -- will typically undertake to protect its security. . . . This norm of lender responsibility for insurance, maintenance, and property taxation costs after default should also apply to [Common Interest Community] homes. Imposing lender responsibility for security preservation costs . . . is appropriate because . . . this obligation would merely call upon the lender to protect its own security . . . Furthermore, the lender is able to protect itself against losses on its loan in ways community associations cannot. Unlike most associations, the lender can investigate and disapprove of the borrower's credit. It can control its risk by varying the loan size relative to value of the security or by requiring the escrow of funds to cover priority claims. Furthermore, the lender can obtain mortgage insurance. These safeguards are not available to community associations. As the unit owner's involuntary creditor, a community association exercises no discretion over whether to rely on a particular debtor for its income stream.

Thus, in order to protect the association's income stream, and in acknowledgment that the mortgage lender should pay for its share of protecting the unit that secures its loan, CIOA provides that at least a portion of the lien enjoys priority over the mortgage.

C. **Raised Bill No. 6662 should be revised to clarify that the priority portion of association liens are "evergreen" in nature.**

As cited above, the association lien for unpaid common charges is a perpetually renewable lien. Such liens are referred to as "evergreen" liens.

Despite this, some mortgage lenders are now arguing that if the lender pays the outstanding balance in full on behalf of the unit owners, they have permanently satisfied the priority lien. All future assessments levied by the association would enjoy no priority over the mortgage.

This argument runs contrary to the very purpose of the priority lien. Nevertheless, at least two Connecticut Superior Courts have agreed with the lenders. If this argument were to be Connecticut law, it would essentially eviscerate the protections afforded by granting associations a priority lien.

As contemplated by Mr. Winokur, the economy is presently in a weak state where the value of homes have fallen below the outstanding balances of the mortgages. Furthermore, for a number of reasons, it is taking lenders far longer than ever before to complete their foreclosures. It now is not uncommon for an association to have to bring two or more foreclosures against a unit owner during the pendency of a single mortgage foreclosure against the same owner.

If the lender pays once and the association's lien no longer enjoys any priority over the mortgage, then as observed by Mr. Winokur, the association has no real ability to foreclose and all future assessments essentially become uncollectible.

In the attached article, Mr. Winokur addressed the lenders' argument as follows:

> [A] mortgagee permanently redeeming either the Prioritized Lien or the entire association lien -- so that uncured or future delinquencies could not come within protection of such lien -- would be inconsistent with the perpetually renewable nature of the UCIOA lien . . . While the super priority provision contemplates a six-month maximum at any given moment, it contemplates no limit over time. Whatever happens to the six months of assessments prioritized by initiation of a foreclosure action in the middle of year one, a Prioritized Lien of up to six months assessments exists if another enforcement actions is initiated in year three -- or at ***any*** future time. [Emphasis supplied].

Raised Bill No. 6662 should be revised to make it clear that the priority lien is an evergreen lien. Attached hereto as Exhibit B is language that, if added to the bill and adopted by the General Assembly, would address this issue.

It is worth noting that the Connecticut Chapter of the Community Associations Institute is working with the Connecticut Bankers Association to reach an agreement on the final language of the attached draft.

D. <u>The amount of the priority lien should be increased from six to twelve months' worth of common charges</u>.

As stated above, the economy is presently in a weak state and it is taking lenders longer to complete their foreclosures.

Because an association lien has priority over the mortgage for only six months' worth of the outstanding assessments, it likely that any charges in excess of six months' worth will become uncollectible. Therefore, associations must move swiftly to foreclose the lien in order to minimize the amount of common charges that may become uncollectible.

By increasing the amount of the priority lien to twelve months' worth of common charges, associations are under less pressure to move swiftly to foreclose the lien. They can give lenders more time to complete their own foreclosures, rather than having to rush forward with separate foreclosure actions.

Increasing the amount of the priority also better protects the association and the unit owners by ensuring that a larger portion of the unpaid charges owed by a delinquent owner can be collected through the foreclosure process, rather than being shared by the other owners in the community.

For the reasons set forth above, the General Assembly should revise and adopt Raised Bill No. 6662.

If I can furnish the Committee with any further information or assistance, please do not hesitate to contact me.

Respectfully Submitted,

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Exhibit A

27 Wake Forest L. Rev. 353

Wake Forest Law Review

1992

Symposium Issue: Uniform Real Property Acts

MEANER LIENOR COMMUNITY ASSOCIATIONS: THE "SUPER PRIORITY" LIEN AND RELATED REFORMS UNDER THE UNIFORM COMMON INTEREST OWNERSHIP ACT [a1]

James L. Winokur [aa1]

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*354 INTRODUCTION

The Uniform Common Interest Ownership Act (UCIOA), promulgated in 1982 by the National Conference of Commissioners on Uniform State Laws (Uniform Laws Conference), consolidates previously promulgated uniform acts which address condominiums,[1] planned communities[2] and cooperatives.[3] The consolidation of acts regulating these three different ownership forms is based on the Uniform Laws Conference's accurate perception[4] that, substantively, all three forms share a fundamental common trait: in all these forms unit owners beneficially[5] own both their own units and the community's common elements, with a mandatory community association managing the common areas. Thus, common interest communities (CICs) regulated by UCIOA include all developments which have mandatory community associations responsible for managing common areas or assets, with funds assessed by the association against individual homeowners, and enforcing use restrictions throughout the *355 common interest community.[6] Thus, CICs include condominiums, town-houses, free-standing single-family residences, cooperatives, and other planned unit developments.

CICs were relatively novel ownership forms only twenty-five years ago. Since then, they have proliferated, and now CICs account for a substantial portion of the entire United States housing stock. CICs currently include residences of approximately 30,000,000 people or more, including 12-17% of the U.S. population.[7] While condominium development may have peaked temporarily in some areas,[8] the overall number of common interest communities is expected to grow substantially again during the 1990s.[9]

One factor contributing to the recent growth of CICs is the affordability of clustered housing in which the crowding of individual homes is offset by substantial common areas and facilities, developer economies in overall acreage, construction of homes and infrastructure, and in provision of public service, where streets built for private maintenance are held to less exacting standards than the local governments would require if the same streets were dedicated over to public ownership and care. Furthermore, CIC developments have been the vehicle for privatization of a range of previously public services, including not only *356 maintenance of facilities, but also services such as trash collection, snow removal, street maintenance and cleaning,[10] with community associations both obligated and empowered to perform them or contract for their performance.[11] Planned Unit Developments (PUDs) have allowed local planning commissions to save local governments money by requiring that streets, other infrastructure or mandatory amenities such as drainage basins or parks be provided by the subdivision developer rather than the municipality, and then maintained privately by an association so that the public government avoids maintenance responsibilities.

I. ASSESSMENT DELINQUENCIES AND CIC FINANCIAL WEAKNESS: THE NEED FOR REMEDIAL LEGISLATION

In carrying out their crucial responsibilities for preservation and maintenance of community infrastructure and common assets such as building exteriors, associations vary greatly as to their financial strength,[12] and the financial and personal management experience of their *357 elected officers.[13] The main source of financial and interpersonal strain on association boards is the association's inability to collect assessments.[14]

Contributing to many associations' financial weakness, the collection of delinquent assessments has been an extremely inefficient and often frustrating process. In hard economic times, assessment collection typically becomes both more important and less effective. Traditionally, CIC declarations, and many state statutes,[15] have provided that the association holds a lien against each unit to secure payment of owner assessment obligations. There is common law authority[16] that these assessment liens *358 have priority over all unit mortgages.[17] However, state statutes[18] and declaration provisions[19] have typically been effective to relegate this assessment lien to junior priority relative to at least some mortgages against the same unit. Therefore, associations typically compete unsuccessfully for foreclosure sale proceeds with lenders who hold mortgages on

CIC units. Typically, the foreclosure sale bid will equal no more than the foreclosing lienor's debt, [20] leaving no foreclosure sale proceeds remaining to pay any of the association's lien. [21] In a weak market, where the unit's value would *359 be lower than the amount of the senior mortgage, the association lien's junior priority is particularly devastating. Since any assessment lien foreclosure purchaser would have to buy subject to a mortgagee lien greater than the entire current property value, foreclosure of the junior association lien becomes a worthless remedy.

In evaluating the policy of according unit mortgagees priority over association assessment liens, it would be folly to ignore the needs of mortgage lenders, whose CIC investments have from the start been crucial to the emergence of these new ownership forms. [22] On the other hand, the financial strength of an association often bears strongly on the value of the housing units in which both lenders and residents have invested. Indeed, as assessments on some properties in a community become uncollectible, the CIC unit lender is itself damaged by increasing assessments and decreasing values for other properties it may hold as security. [23]

Associations in weak financial condition cannot always justify incurring the costs involved to pursue collection efforts for unpaid assessments actively, especially when they are unsure of the ultimate results of the enforcement effort. When CIC assessments go uncollected, however, the defaulting homeowner's share of community costs to maintain common elements currently falls on those least responsible for the default--neighboring homeowners who regularly pay their assessments, remain in good standing, and constitute the community association. [24] As their assessments rise, these owners face greater pressure to default if they cannot afford the assessment increases, and lower valuations of their homes should they opt to sell in order to escape unanticipated assessment costs. [25]

Faced with this dilemma, some associations attempt to defer the *360 problem by leaving assessments artificially low for a period during which the association operates on a shoestring, cutting back on maintenance and other services. But this strategy also overburdens the owners in good standing. It hastens the decline of the common facilities and the need for major repairs or replacements of community assets. These impacts will also inexorably lower the market value of homes in the CIC.

This syndrome of disproportionately burdening owners in good standing--whose resulting assessment defaults further burden a shrinking group of owners still paying--is greatly exacerbated in hard economic times; foreclosures and abandonment of CIC units severely deplete the assessment base and property values within these communities. [26] As the assessment base dries up, it is difficult for association leadership to maintain common elements. As a result, CICs will face the quandary of either heavily assessing the decreasing number of remaining solvent residents, often in excessive amounts, or deferring needed maintenance facilities as basic as the roofing over individual units, only to be later forced to higher assessments as deferred maintenance takes its toll. As CICs age further and require more substantial maintenance, these problems will become more and more acute. Considering that most presently existing associations are less than 20 years old, [27] the worst CIC maintenance crises lie ahead. [28]

When a homeowner defaults on a mortgage loan outside community association developments, the lender assumes substantial financial responsibility for the property. At least pending foreclosure, the lender--who will likely own the home after foreclosure [29] --will typically undertake to protect its security. [30] The lender may often find it unfeasible to care for the property by possessing it. However, where the borrower has become irresponsible, the lender will often pay costs of casualty insurance, security, physical maintenance of the exteriors of homes and landscaping. [31] Prominent among these burdens is the payment of property *361 taxes. In this era of privatized public services, with private associations rather than public governments collecting trash, maintaining roads and parks, and the like, association assessment charges have become more and more analogous to property taxes, liens which receive priority over virtually all others.

This norm of lender responsibility for insurance, maintenance, and property taxation costs after default should also apply to CIC homes. Imposing lender responsibility for security preservation costs it would bear in other, non-CIC communities is appropriate because--as in those other communities--this obligation would merely call upon the lender to protect its own security, albeit partly in the form of assessment responsibility in a CIC. Furthermore, the lender is able to protect itself against losses on its loan

in ways community associations cannot. [32] Unlike most associations, [33] the lender can investigate and disapprove a homebuyer borrower's credit. It can control its risk by varying the loan size relative to value of the security or by requiring the escrow of funds to cover priority claims. Furthermore, the lender can obtain mortgage insurance. [34] These safeguards are not available to community associations. [35] As the unit owner's involuntary creditor, a community association exercises no discretion over whether to rely on a particular debtor for its income stream. [36]

UCIOA's provisions delineating the respective creditor rights of community associations and mortgage lenders grow out of recognition of the harsh realities of community associations' economics, the nature of mortgage lenders' risk and risk avoidance mechanisms in CICs, and the importance *362 of lenders' continued CIC investment. These realities require financially solvent community associations, which operate more efficiently in collecting and managing assessment revenues. In that sense, what is required are "meaner, leaner" economic units, which can be relied upon by both CIC investors and the community at large to effectively perform the maintenance functions they were created to undertake. [37] Consequently, UCIOA enables more efficient collection of common assessments from all unit residents. [38] Where recovery from some unit owners is thwarted, UCIOA imposes a significant but limited portion of the unpaid assessment burden on the defaulting unit owners' lenders, whose security is enhanced with those very assessment dollars. [39]

This article will examine and critique the assessment collection remedies created by UCIOA, focusing primarily on the super priority accorded to the new statutory assessment lien. First, the article details an association's collection remedies. It includes an analysis of the split priority whereby delinquencies up to six months of assessments take priority over first mortgages on CIC properties, with the remainder of those delinquencies taking priority over only liens and encumbrances other than first mortgages. The article next addresses troublesome questions regarding applicability of the super priority to CICs in existence before UCIOA's enactment, and the priority of the association lien relative to mechanics' liens. Then, the principles of the new lien priority concepts are applied in a sketch of foreclosure and redemption strategies. A separate section then analyzes several other UCIOA reforms aimed at regularizing financial management of community associations, and supporting UCIOA's assessment collection process. Finally, the article responds to several prophecies of doom if UCIOA becomes law, reviewing available evidence as to the actual impact of the statute where it has been in force.

*363 II. UCIOA'S RESPONSE: TOUGHENING ASSESSMENT COLLECTION REMEDIES FOR COMMUNITY ASSOCIATIONS

A. Recovery of Collection Costs

UCIOA contains several measures to strengthen association collection powers as a means to increase community associations' financial viability. UCIOA supplements existing community association rights by authorizing the association to "impose charges for late payment of assessments and, after notice and an opportunity to be heard, levy reasonable fines for violations of the declaration, bylaws, rules and regulations of the association." [40] This bolsters a community association's "'governmental' functions as the ruling body of the common interest community," [41] but it would be far more effective if it also addressed the often paralyzing specter of attorney fees for enforcement of assessment obligations. [42] With public hostility toward lawyers running high, attorneys fees legislation could be controversial. However, since individual delinquencies are often small components of a substantial total of assessments owed by all residents in a community, enforcement of assessment delinquencies will often not take place if the association lacks recourse to recover its expenses. The importance of enabling associations to collect attorneys fees for enforcement of assessments, whether by lien foreclosure or personal suit, cannot be overemphasized. Association fees [43] for late payment of assessments, as authorized by UCIOA, will cover only a small fraction of enforcement expenses.

B. Association Lien with Split Priority [44]

To further support collection of CIC assessments, the UCIOA creates a perpetually renewable association lien for unpaid assessments or fines, *364 "from the time the assessment or fine becomes due" or, where an assessment *365 is due in installments, "from the time the first instalment [[[[sic] thereof becomes due."[45] Subject to any contrary language in the declaration, the "assessments" for which UCIOA's lien is provided includes not only regular monthly dues, but also fees or charges for the use of common facilities or for association services, late charges and fines, and interest.[46]
The UCIOA assessment lien is given statutory priority over all liens and encumbrances on each unit, with the limited exceptions of interests recorded before the declaration, liens for taxes or other public governmental charges, and first mortgages recorded before any assessment delinquency.[47] In its most controversial provision, UCIOA grants the *366 assessment lien a further limited priority over such first mortgages.[48] The lien and its statutory priority may not be waived.[49]

1. Super priority versus first mortgages

In its most heralded break with traditional law,[50] UCIOA grants the association a lien priority over first mortgages recorded before any assessment delinquency "to the extent of the common expense assessments based on the periodic budget adopted by the association pursuant to section 3-115(a) which would have become due in the absence of acceleration during the six months immediately preceding an action to enforce the lien."[51] Any excess of total assessment defaults, in addition to other lienable fines or costs over this six-month ceiling remains a lien on the property. The portion of the association lien securing this excess will be junior to the first mortgage on the unit, but senior to other mortgages and encumbrances not recorded before the declaration. Thus, although the association's lien is a single lien, its varying priority effectively separates the association's rights in a given unit into what may be conceived of as two liens,[52] which are hereinafter referred to as the "Prioritized Lien" and the *367 "Less-Prioritized Lien."

A careful reading of the quoted language reveals that the association's Prioritized Lien, like its Less-Prioritized Lien, may consist not merely of defaulted assessments, but also of fines and, where the statute so specifies,[53] enforcement and attorney fees. The reference in section 3-116(b) to priority "to the extent of" assessments which would have been due "during the six months immediately preceding an action to enforce the lien"[54] merely limits the maximum amount of all fees or charges for common facilities use or for association services, late charges and fines, and interest which can come within the Prioritized Lien.[55] So, for example, if a unit owner fell three months behind in assessments, the Prioritized Lien might include--in addition to the three months of arrearages--the other fees, charges, costs, etc. enforceable as assessments under UCIOA.[56] However, for any assessments or other charges to be included within the Prioritized Lien, there must have been a properly adopted[57] periodic budget promulgated "at least annually" by the association from which the appropriate six months assessment ceiling can be computed.

UCIOA's specification of "the 6 months immediately preceding an *368 action to enforce the [association's] lien"[58] as the Prioritized Lien's measuring stick leaves unclear the consequences of an association's non-judicial foreclosure and of a mortgagee's foreclosure to which the association lien is subject. In both these cases, it may be argued that there has been no "action to enforce the [association's] lien,"[59] and therefore there is no prioritized lien.

A less restrictive reading of section 3-116(b) would suggest, first, that a non-judicial foreclosure is an "action" as contemplated by UCIOA. After all, if section 3-116 is adopted with its optional authorization for non-judicial foreclosure of the association lien, it would seemingly serve no purpose to deny the association super priority when the association elected the option this very statute provides. This argument is particularly strong in states where non-judicial foreclosures have mandatory judicial components, thereby more closely resembling a judicial "action."[60] Where the association is party to a judicial foreclosure initiated by a first mortgagee, the association can reasonably argue that the action initiated by the mortgagee has, by joinder of the association, also become an action to enforce the association's lien.[61]

*369 Because of lender fears that the amount of the Prioritized Lien could balloon in any given year, the Colorado version of the super priority subjects the Prioritized Lien to an additional maximum: six times 150% of the average monthly assessment during the association's immediately preceding fiscal year.[62] While limiting the senior lender's exposure for sudden, short-lived assessment increases, this provision still allows assessments to grow quite substantially over time.

2. Limits on applicability of UCIOA "super priority" for assessment liens

UCIOA's provisions on association assessment liens, including the grant of the "super priority" to a portion of that lien, are among relatively few sections[63] of the Uniform Act expressly singled out for application to associations existing before enactment of UCIOA.[64] UCIOA limits applicability of these substantive sections: "those sections apply only with respect to events and circumstances occurring after the effective date of this [[[Act] and do not invalidate existing provisions of the [declaration, bylaws, or plats or plans] of those common interest communities."[65] Clearly, new CICs created after enactment of UCIOA in a given state will be generally subject to UCIOA, including its lien assessment provisions.[66]

In communities predating enactment of UCIOA,[67] UCIOA's association *370 lien provisions also govern the respective priorities of an association lien and a first mortgage, but only where both the lien and the mortgage arise after UCIOA's enactment.[68] Applying the statute to pre-UCIOA mortgages would likely violate UCIOA's restriction on its applicability to events and circumstances occurring after the effective date of UCIOA. However, where a post-UCIOA mortgage is given on the unit in a preexisting CIC, the events and circumstances at issue--the mortgage and any assessment delinquency--will have occurred after UCIOA's effective date.

This analysis is fairly straightforward where the declaration is silent regarding lien priorities, perhaps relying on existing statutory law to resolve the priorities. Applicability of the "super priority" lien also seems appropriate where the declaration provides that priority of the assessment lien will be pursuant to priority imposed in a genenically defined, state condominium or CIC statute.[69] By effectively amending the statute, UCIOA would change the substantive content of the declaration's priority provision.

However, in the many cases where the association declaration expressly provides that first mortgages take priority over the assessment lien,[70] UCIOA's applicability to new financing in preexisting CICs is threatened. First, mortgagors likely will argue that conferring UCIOA's "super priority" upon the assessment lien in the face of a subordination *371 provision in the declaration "invalidates" the declaration's subordination provision in violation of UCIOA's applicability section.[71] Preexisting associations, on the other hand, will seek at least limited application of the new "super priority" lien over first mortgages within their communities. Applicability of the "super priority" lien to new loans in their own community may well have been the basis for CIC's initial support of UCIOA's enactment.

In constructing an argument for application of the "super priority" lien in preexisting communities with subordination provisions, the threshold issue must be interpretation of the declaration's subordination language. Associations may argue that the assessment lien referred to in this contractual subordination referred only to the assessment lien *created by* the same *declaration.* Of course, this interpretation would rely heavily on the specific subordination language. If the contractual subordination is narrowly drawn to subordinate only *"the assessment provided for herein,"*[72] the lien of the UCIOA statutory lien could be portrayed by the association as distinct from the contractual lien created by declaration. As a statutory lien under a statute not even in existence when the declaration was drafted, the UCIOA lien could not have been in the contemplation of the declaration's drafter. Thus, the association would argue, the UCIOA lien is unaddressed and unaffected by the declaration's assessment lien subordination.[73]

Among the virtues of this narrow interpretation is its faithfulness to the literal language of the declaration's subordination clause. A first mortgagee would argue that the subordination clause be read more freely, as subordinating any assessment lien--even the UCIOA assessment lien, which did not exist when the provision was drafted--to first mortgages.

*372 Even if the declaration's subordination is interpreted as intended to cover all assessment liens, contractual and statutory, the association may argue that UCIOA overrides the subordination by expressly subjecting preexisting communities to section 3-116. [74] The association should prevail, and the "super priority" lien provisions will govern priority of assessment liens versus new mortgages, unless application of the super priority provisions is seen as "invalidating" the preexisting CIC declaration's subordination in violation of section 1-204.

UCIOA's section 1-204 declares that, as applied to preexisting communities, the statute may "*not invalidate* existing provisions of the [[[[declaration]." [75] By the better view, according "super priority" to the association lien over a post-UCIOA mortgage would limit, but not "invalidate," [76] the declaration's subordination of the assessment lien. Far from *373 invalidated, the subordination will still apply. First of all, it will give a post-UCIOA first mortgage priority over any excess beyond the limited amount of the Prioritized Lien. Also, the subordination will remain wholly effective as against all pre-UCIOA mortgages, because such mortgages would not be "events and circumstances occurring after the effective date of [[[UCIOA]." [77]
This result is only fair. The priority of association liens on units in preexisting associations with declaration subordination provisions should properly depend on whether competing first mortgages were prior or subsequent to the enactment of UCIOA. Mortgagees making CIC loans after the enactment of UCIOA should reasonably be held to be on notice [78] that they take subject to the "super priority" lien. With such notice available to lenders, there is little reason to deprive preexisting associations of this important benefit of the new legislation which these associations particularly need. Older associations are particularly likely to encounter physical decay of common improvements. Association solvency is crucial in order to repair or replace these aging common improvements. Also, older associations formed when experience with CICs was very limited are the most likely to have relatively primitive documentation, providing inadequate collection remedies for the association, and specifying less realistic mechanisms for amendment of their documentation to add efficient remedies.

In preexisting CICs, recognizing the association's Prioritized Lien as senior to a post-UCIOA mortgage and overriding the declaration's contractual subordination should be permissible under the U.S. Constitution's contracts clause. [79] That clause is the principal reason UCIOA's impact was so narrowly limited in its application to preexisting common interest communities. [80] The only parties in preexisting contractual relationships addressed by this application of UCIOA are associations seeking *374 broader application of the UCIOA lien provisions, and the unit owners who are the declaration's constituent parties. Overall unit owner liability is unchanged by UCIOA's alteration of lien priorities. [81] The parties burdened by the "super priority" lien are those mortgage lenders whose mortgage contracts with unit owners were created after enactment of UCIOA. [82] Therefore, UCIOA's impact on these mortgage contracts is not retroactive, as required for violation of the U.S. Constitution's "contract clause." [83] Regardless of the lenders to which it is applied, the "super priority" lien's constitutionality is further bolstered by its relatively insubstantial, [84] remedial [85] impact requiring merely the prioritizing of six months' worth of assessments. This is a very narrowly tailored [86] method of addressing "a broad, generalized economic or social problem." [87]

3. Priority versus mechanics' liens

In language which may prove ambiguous, UCIOA also expressly avoids changing governing state law regarding attachment and priority of mechanics' and materialmen's liens. [88] Under most states' mechanics' and *375 materialmen's lien statutes, certain workers and suppliers otherwise unsecured claims for work performed on real estate are accorded a statutory lien which, once perfected by proper filing, relate back for priority purposes to the commencement of work on a project or some other date preceding perfection of the lien. [89] Where such a mechanics' or materialmen's lien is competing with an association assessment lien, the result will turn on the date as of which the association assessment lien came into existence.

By the language of section 3-116(a), the assessment "is a lien from the time the assessment or fine becomes due." The assessment due date, therefore, is likely, the critical comparison date for prioritizing the assessment lien versus a mechanics' lien under section 3-116's present language.

On the other hand, in setting priorities between the association assessment lien and first mortgages,[90] section 3-116(b) compares perfection (recordation) of the mortgage with the date the assessment became delinquent.[91] Perhaps the moment of assessment delinquency is the critical date for comparison with relation back date of mechanics' or materialmen's lien, just as with priority competition between the assessment lien and the first mortgage.[92] After all, regardless of UCIOA's language dating the lien from the due date, delinquency is prerequisite to having an enforceable lien.

Yet another, somewhat less likely comparison date would be the date of the declaration creating the CIC. Under the general rule of section 3-116(b), liens and encumbrances recorded before the recordation of the declaration are the only interests taking priority over the association assessment lien. However, section 3-116(b) seems clearly to except mechanics' or materialmen's liens from that general rule.[93] Therefore, the use of its comparison date would seem contrary to the drafters' intentions.

*376 *C. Foreclosure and Redemption Options*

UCIOA provides that the association lien may be foreclosed "in like manner as a mortgage on real estate"[94] or, pursuant to optional language, by power of sale.[95] However, power of sale foreclosure is unavailable in many states.[96] Some others with provision for non-judicial foreclosures have nonetheless adopted UCIOA, requiring that the assessment lien can be foreclosed only by judicial foreclosure as a mortgage.[97]

The distinction between judicial and power of sale foreclosure, important in all foreclosure settings,[98] is particularly crucial in foreclosures of CIC association assessment liens, where assessment defaults continue to mount during the pendency of foreclosure proceedings. Given the relatively small dollar amount of assessment arrearages, especially those holding super priority under UCIOA, extension of foreclosure from the few months or less required for non-judicial foreclosure to the one and one-half to two years required for judicial foreclosure[99] can generate additional assessment defaults several times the amount of the assessment default first foreclosed upon.[100] The relatively small stakes in an assessment foreclosure may also generate a hostile judicial response to devoting court time to such cases.[101] On the other hand, a statutory grant of power of sale foreclosure authority raises several problems,[102] among which would be the more likely application of constitutional due process safeguards to *377 a power of sale created by statute than to one privately conferred.[103] On balance, however, it is excessively burdensome to restrict associations to judicial foreclosures in a state where power of sale foreclosure is permitted.[104] UCIOA should be adopted including the optional language of section 3-116(j)(1) and (2) permitting associations foreclosure by non-judicial foreclosure.

Whatever the foreclosure process permitted in a given UCIOA state, an association could act on its Prioritized Lien by initiating foreclosure against a unit in assessment default. Along with the unit owner, the association would join the holders of any mortgages, deeds of trust, or other interests junior to the Prioritized Lien as necessary parties to a judicial foreclosure. In non-judicial foreclosure, these same parties would be formally notified of the sale. Under either method of foreclosure, holders of junior interests would stand to receive the excess, if any, of the foreclosure sale price over the amount of the Prioritized Lien, in the order of their priorities. The association's Less-Prioritized Lien would be among those junior interests.

The process would vary considerably if, instead, the party seeking foreclosure were the holder of a first mortgage on a CIC unit. Regardless of whether the first mortgagee's loan is in payment default, default on the association assessment is also likely an event of default under the mortgage, allowing its holder to initiate foreclosure. If a Prioritized Lien were outstanding against the unit, the mortgage and its foreclosure would be subject to the association's Prioritized Lien. As a senior interest, the association's Prioritized Lien could probably not be forced into the mortgage foreclosure.[105] The Prioritized Lien can receive no portion

of the foreclosure *378 sale proceeds without participating in the foreclosure. However, payment of the Prioritized Lien--which, unlike the Less-Prioritized Lien, should survive this foreclosure [106] as a senior interest--will be necessary to clear title for resale of the unit, or often for presentation of mortgage insurance or guaranty claims to the FHA [107] or VA. [108]

If the association wished to include its Prioritized Lien in a foreclosure initiated by the mortgagee, an additional problem might arise where the association lien must be foreclosed judicially in a state which otherwise recognizes power of sale foreclosure. [109] In that case, if the association is to be included in the foreclosure, the first mortgagee might instead need to yield and use judicial foreclosure. But the mortgagee would presumably resist switching from the more efficient non-judicial foreclosure to the slower, more expensive judicial proceeding.

Ironically, the burdensome requirement that the association foreclose judicially could increase the association's leverage over a first mortgagee foreclosing by power of sale. In suing to foreclose on its senior Prioritized Lien, even after a power of sale foreclosure has been commenced by the *379 mortgagee, the association will have to join as necessary parties the first mortgagee, the owner, and all other junior interests--all holders of parts of the equity of redemption vis a vis the association's lien. [110] With these necessary parties also standing to be extinguished in the mortgagee's power of sale foreclosure, pursuit of the association's foreclosure lawsuit should require suspension of the non-judicial foreclosure, in order to allow the judicial foreclosure to go forward with the mortgagee and all other necessary parties participating. [111] If the association can predictably accomplish suspension of the power of sale foreclosure, enforcement of the association's lien will threaten substantial delays to the secured lender.

Those who drafted UCIOA's "super priority" lien provisions appear to have been fixated on foreclosure. This fixation is quite understandable since a primary and favorable impact of the "super priority" lien will be to allow aggressive associations to bring units with defaulted assessments into foreclosure. Without UCIOA in effect, lenders holding defaulted mortgages on CIC property have often felt little motivation to foreclose for extended periods until they have finally worked out some disposition for the property. This delay can mean the difference between financial life and death for the many CICs in economically depressed markets, where a single lender holds defaulted mortgages on a substantial number of units which have either insolvent or abandoning owners. With UCIOA's "super priority" lien in effect, the lender is vulnerable to the association's foreclosure--which may be especially costly where the association has no access to an otherwise available non-judicial foreclosure process [112] and must foreclose itself by judicial process. To retain control over any foreclosure, the lender may agree to pay delinquent assessments to the association as necessary, even including new assessments pending completion of foreclosure, for which the lender is technically not liable. [113] But the more important goal of the association in foreclosure will be to speed the time when the unit is owned by an entity, probably the lender purchasing at foreclosure, which will pay assessments regularly in the future. If the lender holds multiple properties in a CIC, the resulting assessment income can be very substantial.

*380 Facing the threat of even a relatively efficient foreclosure, [114] the first mortgagee holding subject to a potential Prioritized Lien will consider paying the association the portion of the unit owner's debt secured by the Prioritized Lien. Mortgagee payment of the Prioritized Lien was the lender response envisioned by UCIOA's drafters. [115] Such payment might also seem attractive where an assessment default is not accompanied by a default in mortgage payments. According to provisions in most mortgages, the lender's payment to the association of its borrower's delinquent assessments can be added to the secured debt. [116]

By payment of the delinquent assessments, the mortgagee might be contemplating a result analogous to that triggered by the equitable redemption from mortgages generally--acquiring the senior lien by paying it off. [117] As a result of UCIOA's fixation on foreclosure, however, the parties' respective lien rights under section 3-116 are less clear in pre-foreclosure settings than once foreclosure is commenced. Also, UCIOA's perpetually renewable, statutory lien works differently in several respects from a mortgage securing a fixed or decreasing debt, so that payment of the Prioritized Lien at any given moment cannot permanently eliminate the senior lien as a threat to the first mortgage, which is normally the goal of redeeming from a senior mortgage.

One difference between the UCIOA lien and an ordinary mortgage is that the Prioritized Lien and the Less-Prioritized Lien are both parts of the same lien, with varying priorities. A mortgagee seeking literally to equitably redeem the Prioritized Lien would thus face the all-or-none rule, requiring redemption of all or none of the lien, here both the Prioritized and Less-Prioritized Liens, unless the senior lien holder otherwise elects to accept a partial redemption. [118] On the other hand, the mortgagee seeking redemption would have no right to redeem an interest junior to its mortgage, [119] arguably including the Less-Prioritized Lien. The mortgagee can probably solve these problems by requesting to pay the entire assessment delinquency, as secured by both Prioritized and Less-Prioritized Lien. The association would have little motive in rejecting such an offer. However, following such payment, any new delinquency would again be secured by the UCIOA lien, with its super priority for the first dollars of *381 delinquency up to the six-month maximum. UCIOA's lien covers all assessments, with no language suggesting that payment of earlier delinquencies leaves later assessments unsecured. Nor does the super priority provision contain language suggesting any reduction of the amount prioritized based on payment of previously prioritized amounts.

A second difference between ordinary mortgagee redemption of a senior mortgage and attempting redemption of the Prioritized Lien is in computing the amount necessary to redeem. The maximum amount for Prioritized Lien is potentially changing at all times as new assessments are levied and some or all go unpaid, as is the amount of the total UCIOA lien. Each assessment default increases the overall association lien. Meanwhile, the maximum size of the Prioritized Lien, *"the common expense assessments . . . which would have become due . . . during the 6 months immediately preceding institution of an action to enforce the lien"* [120] --remains unknowable (except by approximation). This is true until an action to enforce the lien is instituted, pinning down which six months of assessments are to be used to compute the maximum. By floating the potential Prioritized Lien maximum by reference to changing assessment figures, UCIOA continually redefines the Prioritized and Less-Prioritized Lien, portions of the total overall assessment lien flowing into the Prioritized Lien any time the Prioritized Lien total falls below its maximum, and flowing back to the Less-Prioritized Lien any time the applicable maximum decreases. As a result, until an action to enforce the UCIOA lien is initiated, there is literally no proper amount to be paid in order for a mortgagee to redeem the lien.

Put another way, under the current language of section 3-116(b), there *is no Prioritized Lien until* the moment *foreclosure* is initiated. [121] So there is no lien to redeem, even though one will materialize instantaneously upon initiation of foreclosure.

Even more fundamentally, a mortgagee permanently redeeming either the Prioritized Lien or the entire association lien--so that uncured or future delinquencies could not come within protection of such lien--would be inconsistent with the perpetually renewable nature of the UCIOA lien. UCIOA accurately contemplates ongoing extensions of credit by the association to the unit owner. It also provides that unit owner's assessment obligations shall all be secured with at least some priority over competing encumbrances. Just as the association cannot really limit its own extension of credit, the statute contemplates no limit on the over-all assessment lien in dollars or time. While the super priority provision contemplates a six-month maximum at any given moment, it contemplates no limit over time. [122] Whatever happens to the six months of assessments prioritized by initiation of a foreclosure action in the middle of year one, a Prioritized Lien of up to six months assessments exists if another enforcement action is initiated in year three--or at *any* future *382 time. [123]

A first mortgagee seeking protection from the Prioritized Lien by paying off the assessments it secures (or even paying off all overdue assessments) might seek to document its payment as a purchase of association rights to foreclose on any Prioritized Lien--including one consisting of new delinquencies--for some time into the future. [124] Phrased, differently, [125] the mortgagee could describe the deal as an assignment to the mortgagee of the association's Prioritized Lien. Under an assignment, the mortgagee/assignee would intend for the lien to remain alive and still securing the amount the mortgagee paid for it. So long as the Prioritized Lien now held by the mortgagee/assignee remained alive and unforeclosed, no additional delinquencies could gain the benefit of the super priority.

From a public policy perspective, the advantage of honoring this "assignment" approach is in creating an incentive for first mortgagees to pay the association the Prioritized Lien. [126] However, even if a court would seriously consider recognizing assignment of a lien which does not and may never exist, such an assignment of the Prioritized Lien should violate the UCIOA's

prohibition against waiver or variation by agreement of UCIOA-created rights. [127] To allow the mortgagee to purchase this lien, so *383 that the association would relinquish its prioritized security for all future assessments, either permanently or for some extended period, would fly in the face of UCIOA's statutory scheme. It would be as if a governmental taxing authority were to give up its future power to attach prioritized tax liens for new defaults whenever one deficiency were cured. In levying assessments, the association is somewhat analogous to a governmental authority [128] levying taxes. Like the government, it must collect assessments from its residents to perform critical functions which clearly resemble governmental responsibilities. [129] Like the government, the association has *384 the option neither to deny extending more and more credit over time to unit owners nor to withhold performance of its responsibilities to maintain the community physically. And like government, its ability to function in socially critical arenas depends on renewable, prioritized lien protection of its assessment income.

An additional analogy supports the association's continued entitlement to perpetually renewable security for all future assessments, and priority for a substantial portion of those assessments, even after past defaults have been cured. In a very real sense, the association is like the senior lienor holding a mortgage which secures obligatory future advances. As Henry Judy and Robert Wittie have observed, the CIC is, in effect,

an *involuntary* creditor which becomes obligated to advance services to unit owners in return for a promise of future payment. Such payments are much like the loans made by a mortgagee under an obligatory mortgage future advances clause, but with only the most rudimentary controls upon the amount and timing of loan advances, the terms of the loan, and the continuing credit worthiness of the borrower. [130]

Clearly, the UCIOA lien secures future advances in the sense of continually accruing assessment obligations, with the association obligated continually to pay out maintenance and operational costs for the entire community regardless of its receipt of payment. Lenders financing the purchase of CIC units can reasonably be held to realize that these costs and debts must, by their very nature, persist into the future regardless of the association's preferences, and to understand that assessments and defaults will change over time.

Like the holder of a mortgage securing obligatory future advances, [131] the association's priority for its lien should not be limited at some amount or point in time while the association's obligation to make advances persists. Rather, new advances, costs covered by assessments, should relate back and receive the same priority accorded to the original association lien (under UCIOA, holding a split priority) relative to intervening liens like the first mortgagee. With a senior mortgage to secure obligatory future advances, no one's payment of a past advance blocks inclusion of future obligatory advances in the priority lien. The same result should hold for community associations and their prioritized statutory *385 lien.

Despite the unavailability of protection fully analogous to that afforded by equitable redemption, first mortgagees whose own loans are not in payment default may very well elect to pay assessment defaults in order to eliminate the present threat of foreclosure by the association. [132] While such mortgagees will remain vulnerable to future defaults gaining priority over them, those defaults will hopefully take some time to rise to a level where association foreclosure would become worthwhile. Indeed, at least where generalized economic conditions are not severe, the first mortgagee can often persuade the unit owner to cure its assessment default and keep its assessments current in the future. [133] In weaker economies, however, the lender may decide to refrain from paying assessment delinquencies until the lender obtains title to the unit in foreclosure, after which payment is far more likely. [134]

III. STREAMLINING INTERNAL ASSOCIATION FINANCIAL MANAGEMENT

The lien priority provisions of UCIOA are integrally bound up with a series of additional measures designed to strengthen associations financially, by regularizing association management not only in the collection of assessments but also in budgeting and record keeping generally. In addition to their direct impacts on availability of the UCIOA "super priority" for association liens, these provisions aim to discipline and streamline association management to create financially stronger, more decisive--"meaner, leaner"--associations.

A. Recording the Assessment Lien

First, UCIOA provides that recording the CIC declaration itself constitutes record notice and perfection of the lien for assessments. [135] In many states, recording of a delinquency notice has been deemed necessary to perfect any lien for unpaid assessments. [136] But the burden of recording individual delinquencies, unit by unit, can be overwhelming and unnecessary for associations, especially when their management consists of amateurs. Attorneys attempting perfection by recording delinquencies *386 have varied in opinion as to whether each successive default on a given unit must be recorded, or whether recording one delinquency on a unit will perfect the lien as to subsequent delinquencies as to the same unit. [137] In place of requiring recording of individual delinquencies, UCIOA requires recording of only the declaration [138] and a formalized assessment status reporting system. [139] Under UCIOA's language, the statutory lien is based on the association's existence and not on its declaration's content. Thus, there is no requirement in UCIOA that the declaration contain a provision creating an assessment lien. [140]

Desirable though it may be to require recordation of only the declaration, the present language without more may leave a community association in some states off the list of parties receiving notice of any senior mortgage foreclosure against a unit in their CICs. Some state statutes confine their list of parties to whom notice foreclosure must be provided to holders of interests "recorded subsequent to the [mortgage or] deed of trust being foreclosed and before recordation of the notice of sale." [141] Because the declaration was likely recorded before recordation of the mortgage or deed of trust being foreclosed upon, the association might not be entitled to notice of foreclosure of such a mortgage or deed of trust, even though its Less-Prioritized Lien would stand to be extinguished in such a sale. Recording delinquency notices could cure this problem. Preferably, UCIOA should be amended to clarify that recordation of the declaration, *387 even though predating recordation of a first mortgage or deed of trust, would entitle the association to notice of foreclosure in these cases.

B. Assessment Status Inquiries

As an efficient substitute for recording separate notices of delinquencies against each unit owing unpaid assessments, UCIOA codifies each unit owner's ability to obtain from the association verification of the status of any unpaid assessments charged against the unit. [142] Within ten business days after receiving the owner's written request, the association is obligated to provide a recordable assessment status certificate binding on the association, the board and all unit owners in the CIC. The statement can then be presented to other interested parties, such as a mortgagee or potential buyer. Furthermore, it can be placed on the public record.

This provision for assessment status reports codifies what had become standard practice in many communities that had no statute mandating provision of such "estoppel statements." As a precondition to some contemplated transactions, buyers, lenders and title insurers regularly insist on proof that assessment delinquencies do not encumber the unit. In expressly obligating the association to respond to these requests, however, UCIOA increases the unit owner's leverage in seeking a response from a recalcitrant board. Further, the information contained in the statement required by UCIOA is more precise and reliable than a simple recorded notice of delinquency, which will often point to a single default, without revealing whether subsequent defaults have increased the size of the assessment lien.

Nonetheless, the UCIOA provision could be strengthened in several respects. Most importantly, the statute should ideally specify the consequences of an association's failure to respond to a request for an assessment status report. Such a non-response is a particularly troubling risk with weakly managed association boards unaware of their obligations or of how precisely to fulfill them. [143]

Arguably, the consequence of a non-response and a late response should be the equivalent of a response that there are no assessment delinquencies chargeable against the unit. Thus, any delinquencies outstanding at the time of an unanswered status report request would become wholly unenforceable, by either foreclosure or personal action on the assessment debt. In this same strict spirit, late responses might be treated as no response at all. A more moderate approach to the association's failure to timely respond could trigger loss of the association's entire statutory lien [144] for assessments then outstanding, but without

affecting the *388 association's unsecured claim against the unit owner. [145] An even milder remedy where no timely response is forthcoming would entail merely loss of super priority for the unreported assessments then outstanding; the unreported delinquencies would remain secured by the association's Less-Prioritized Lien. [146] Of course, if delinquencies continue to mount, the new delinquencies would become part of a renewable [147] Prioritized Lien and the earlier loss priority would be nullified. In selecting from these potential sanctions, the goal should be not only to motivate a response once a request is received, but also to encourage the association more generally to undertake management practices necessary to enable prompt responses to all requests.

An ideal assessment status report statute should also clarify who can receive assessment inquiries for the association. With informal association organizations and changing citizen leadership, the inquiring unit owner could well encounter the objection of having asked the wrong party. Colorado addresses this problem by requiring that the inquiry be addressed to the association's registered agent. [148] Associations may wish to appoint their management company, if any, or their attorney as the appropriate agent. Designation of an association officer runs a far greater risk that the *389 individual designee will change without all members of the community realizing the change has occurred.

Finally, the statute could also specify how inquiries or responses under this section can be later proven, when one of the parties disagrees over who did what when. Thus, Colorado's provision specifies use of "certified mail, first class postage prepaid, return receipt requested," [149] for these inquiries and responses, so that proof of either the request or the response will be readily available.

C. Budgeting

To focus the association's internal financial planning, UCIOA also requires annual association budgeting once the first association assessment has been made. [150] Availability to the association of the Prioritized Lien also depends on adoption of such an annual budget, because the assessments used to measure the six-month super priority must be based on such a budget. [151] Once the association board adopts a proposed budget, UCIOA requires notice to the community of the budget proposal and of an opportunity to meet and review the proposal. [152] However, regardless of actual attendance at the announced budget meeting, the budget is considered automatically accepted unless a majority of all homeowners, or any larger percentage specified in the declaration, objects. If the budget is rejected, the previous budget in effect for the association continues until a new proposal successfully survives this process.

The UCIOA budget provision draws fire from some community association officers as generally too burdensome, and as opening the floodgates to paralyzing dissent on budget issues which must be efficiently resolved. However, the UCIOA procedure strikes a remarkably good balance between insisting on methodical financial planning by associations [153] and allowing boards leeway to govern without fruitless disruption by unrepresentative, disgruntled residents. [154]

IV. PROPHETS OF DOOM: FEARS OF THE "SUPER PRIORITY" LIEN

In the various jurisdictions which have considered UCIOA, opposition to the legislation has focused primarily on the "super priority" lien for associations collecting defaulted assessments. In addition to lender interests, opposition has come from several other constituencies whose positions on the "super priority" lien have varied from state to state. [155] *390 Though the arguments over UCIOA's "super priority" lien varied from state to state, certain themes emerged--often focusing on fears that the new "super priority" lien would foul up existing real estate, lending or insurance markets. Several such prophecies of doom are recounted and addressed below.

A. Marketability of CIC Mortgages on Secondary Market

Among the arguments often made against adoption of the "super priority" lien is that this priority would impair sale of mortgages on the secondary market because of government requirements that such mortgages be first liens. [156] This, in turn, would dry

up mortgage funds to CIC unit owners in states imposing the "super priority" lien for assessments, interfering with sales of CIC properties. However, the same Fannie Mae and Freddie Mac regulations which require lenders to receive first liens expressly contemplate acquisition of mortgages subject to the uniform acts' six month assessment lien priority on the same basis as first liens on other residential property. [157] Lenders' and developers' attorneys in states *391 where the uniform acts' "super priority" lien is in effect report that these provisions have in no way discouraged secondary purchase or sale of CIC mortgages subject to such priority. [158]

B. Escrows of Assessments

An additional argument against the "super priority" lien has been that lenders facing a loss of priority would demand that each new homebuyer escrow six months assessments to protect lenders against the risk of having to pay defaulted assessments. Since developers may be unit owners well into the life of a CIC, during which time the allocation of assessment responsibility may not discriminate in favor of the developer, the aggregate of assessment escrows faced by developers owning multiple units could become quite substantial. [159] By this view, such an escrow requirement would inappropriately increase development costs and home purchase costs to potential buyers already coping with high housing costs and, more recently, a troubled economy.

The drafters of the "super priority" lien shared this concern and fully expected that first mortgagees would require that unit owners establish escrows in the amount of the Prioritized Lien. [160] The expectation of *392 escrow requirements was one basis for limiting the Prioritized Lien to equal no more than six months assessments. [161] However, some experience with the super priority lien suggests that lenders may not ordinarily impose any escrow requirement on CIC unit purchasers. [162]

Even if escrows were routinely required, they would be forcing homeowners to pay costs which are, in any case, legitimate costs of CIC homeownership. UCIOA's correct premise is that these very real common costs must be recognized and borne by those who benefit from the maintenance and other services and the facilities generating the costs. With maintenance needs rising as the first large CIC generation ages, [163] we can no longer casually view community associations as a convenient place to transfer unwanted local governmental responsibilities [164] without also enabling associations to raise the funds necessary to meet those infrastructure responsibilities. The "super priority" lien should itself help assessment collections. If that boost is accompanied by the escrowing of a modest amount of assessments per unit, the escrowing should further help assure that CIC homeowners each pay their fair share. Furthermore, it would limit the risk faced by the most reliable homebuyers that, due to others' defaults in the same community, their own assessments may skyrocket while their home values plummet. [165] This lowered risk, in turn, should help CIC properties to hold their value.

C. Title Insurance Coverage

Title insurers have expressed fears of new claims against them under the UCIOA assessment lien priority. One argument is that the structure of the "super priority" lien would place title insurers in the position of insuring against an unforeseen future event, the Prioritized Lien fueled by a default subsequent to issuance of the title policy. [166] Such potential liability seems very far fetched under UCIOA and the standard language of the vast majority of title policies.

*393 UCIOA clearly provides that, although filing of the declaration is prerequisite to the statutory assessment lien's existence, the lien itself dates not from filing of the declaration but only "from the time the assessment or fine becomes due." [167] Given this language, a subsequently arising lien, triggered only upon a default subsequent to issuance of the title policy, would clearly be within the American Land Title Association standard owner's and lender's form Exclusions from Coverage. Absent any contrary endorsement to the standard policy, these exclusions from coverage include "liens, [etc.] attaching or created subsequent to Date of Policy (except [mechanics liens for labor or materials furnished before policy issuance])." [168]

In condominium and planned unit development title policies, there is often added an endorsement which provides the unit owner various assurances about the legality of the condominium's or PUD's documentation, existence and operation under applicable law. [169] These standard endorsements have also traditionally provided coverage against priority of assessment liens over mortgage liens. Thus, the traditional condominium endorsement (ALTA Form 4) adds coverage: "against loss or damage by

reason of . . . [t]he priority of any lien for charges and assessments provided for in the condominium statutes and condominium documents over the lien of any insured mortgage identified in Schedule A." [170] The traditional PUD endorsement (ALTA Form 5) adds coverage: "against loss or damage by reason of . . . [t]he priority of any lien for charges and assessments in favor of any association of homeowners which are provided for in any document referred to in Schedule B over the lien of any insured mortgage identified in Schedule A." [171]

Read literally, these traditionally standard endorsements [172] could conceivably be taken to insure against the super priority of a statutory assessment lien even though the lien arises subsequent to issuance of the title policy as a result of a later default. After all, UCIOA's super priority *394 is accorded literally to "a lien for charges and assessments" and is priority over a mortgage which will be listed in Schedule B. However, such a literal reading of this endorsement flies in the face of the fundamental nature of title insurance which--unlike casualty, health, fire, and other types of insurance--"insure[s] against past risks and excludes [from coverage] future risks." [173]

To clarify this important limitation on coverage against assessment lien priority, the standard ALTA endorsements should be refined. Gurdon Buck has proposed that the relevant paragraph of Form 4 (and presumably Form 5) be altered to limit coverage supplied by the endorsement to: "The priority of any Common Expense assessments, including special assessments, due against the Unit identified in Schedule A and unpaid as of the date of the policy." [174] This endorsement would leave the insurer responsible only for defaulted assessments from before issuance of the title policy. To obtain information about such past delinquencies, the insurer need only obtain the binding assessment status statement required under UCIOA. [175] Inquiries into assessment status have long been standard procedure for many title insurers, but without any statutory provision to back up the request with the force of law. Under the current ALTA policy, with a properly tailored CIC endorsement, title insurance coverage will not extend to a lien arising only upon a later default. If a title company wished to provide such coverage, it could of course elect to do so in its own business judgement, either as a special service to a good client or for an additional fee. [176]

CONCLUSION

The UCIOA "super priority" lien for assessments is a fundamentally sound response to the difficulties community associations have experienced in collecting the assessments which enable performance of association responsibilities. With these associations providing more and more critical, previously public services in our society, and housing some 15% of our population, preserving the lifeline of assessment dollars is a matter of urgent necessity. The UCIOA lien promises to at least substantially improve the financial strength of associations while leaving other secured lenders reasonably well protected and unit owners relatively unburdened by extra payments beyond those previously required. UCIOA accomplished this result by carefully compromising interests represented by associations with those of lenders and unit owners, providing a six-month assessment priority rather than the much larger priorities suggested by some advocates, or by strict adherence to analogies to public government *395 or private lenders with mortgages securing obligatory future advances.

The UCIOA lien provisions can make our sometimes enfeebled community associations "meaner" in the sense of power to be reckoned with by other foreclosure claimants. The supporting financial management provisions can also make them "leaner" by requiring that association budgeting, responsiveness to inquiries, and documentation duties become more focused and streamlined. These sections of UCIOA create some technical issues which further drafting can resolve. Nonetheless, these financial management reforms support the lien provisions, and UCIOA wisely makes them dependent on each other.

As good as the UCIOA "super priority" lien is from a policy perspective, the Uniform Act version is riddled with technical problems which will hinder its functioning. For example, why should the lien provisions focus so exclusively on foreclosure rights at a time when our society is beginning to turn away from litigation toward less adversarial resolution of conflict? Why not count the six month priority from a date other than commencement of foreclosure? Even if foreclosure must remain the focus, why phrase the statute to even possibly suggest that the only foreclosure which creates the super priority is judicial foreclosure by the association?

More difficult questions are posed by UCIOA's applicability rules as applied to the UCIOA lien. With many association declarations containing express subordination of association liens to first mortgages, associations in existence before enactment of UCIOA could arguably lose perhaps UCIOA's strongest benefit, which even UCIOA itself first purports to give to existing associations (by expressly listing section 3-116 as applicable to preexisting communities [177]) before arguably taking it away later in the same sentence with its unwillingness to "invalidate" provisions of existing declarations.

The Joint Editorial Board of the American Bar Association and the Uniform Laws Conference is currently considering adjustments to the Uniform Multiple Ownership Acts. With due reflection, careful tinkering, and the great imagination which has characterized their past work, we can hope for the transformation of a very good remedial innovation to a truly excellent one.

Footnotes

a1 Copyright 1992 by James L. Winokur.

aa1 Professor of Law, University of Denver College of Law, LL.B., A.B., University of Pennsylvania. Gurdon Buck, David Kirch, Jim Strichartz, and Dale Whitman were particularly helpful with comments on earlier drafts of this article. This research also benefitted from the generous comments of Mike Clowdus, Wayne Hyatt, Lynn Jordan, Jerry Orten, and Gary Tobey. Valuable research assistance was provided by Randy Evans, Blake Thompson, and Florian Kogelnick.

1 UNIF. CONDOMINIUM ACT, 7 U.L.A. 421 (1980) [hereinafter UCA]. The original act was adopted by the Uniform Laws Conference in 1977.

2 UNIF. PLANNED COMMUNITY ACT, 7B U.L.A. 8 (1980).

3 MODEL REAL ESTATE COOPERATIVE ACT, 7B U.L.A. 12 (Supp. 1991).

4 A prominent community associations attorney and author, Wayne Hyatt, recently broke ranks with the many association attorneys supporting UCIOA, and questioned UCIOA's premise that all three ownership forms are so essentially similar as to be properly subject to one integrated body of legislation. He asserts that UCIOA
does not mesh well with a large planned community built over a period of years requiring considerable developmental flexibility to meet changed circumstances and times. The legal requirements applicable to the creation of a condominium which usually comprises a single building with a shared infrastructure simply do not apply in most cases when dealing with . . . a master planned community of potentially hundreds or thousands of acres . . . .
Letter from Wayne S. Hyatt, Esq., to Cary S. Griffin, Esq., (Dec. 23, 1991) (on file with author). Hyatt concludes, however, that UCIOA could be effective if modified to provide additional developmental flexibility. Hyatt's concerns with UCIOA do not extend to the assessment lien provisions, which are drawn from the UCA, a statute he has supported. *Id.*

5 Legal ownership of units and common areas, as distinguished from beneficial ownership, varies among condominiums, planned communities and cooperatives. In the condominium form, each unit is owned outright by an owner who, by definition of the condominium, must also hold an undivided ownership interest in the common areas. In cooperatives, the cooperative corporation (i.e., per § 1-103(10), the "association" under UCIOA) typically owns both common areas and individual units, which are leased to residents who, in turn, own the corporation. A planned community is defined in UCIOA as a residual form, being any common interest community other than a condominium or cooperative. UNIF. COMMON INTEREST OWNERSHIP ACT § 1-103(23), 7 U.L.A. at 242 (1982) [hereinafter UCIOA]. Most planned communities are developed under the zoning and subdivision classification "planned unit development, with common area ownership usually held by community association in turn owned by the unit owners." PREFATORY NOTE, UNIF. COMMON INTEREST OWNERSHIP ACT 5, 7 U.L.A. 231, 231 (1982). Another type of planned community covered by UCIOA, though not addressed in its commentary, is the "reciprocal easement" form, where the entire community is divided into privately owned lots subject to mutual reciprocal easements benefitting the individual lots. This form is more often used in commercial contexts, though it also appears in some high rise planned communities and in communities where private roads cross individual lots to reach the interior lots and the highway.

6 Compare UCIOA § 1-103(7), which defines "common interest community" as "real estate with respect to which a person, by virtue of his ownership of a unit, is obligated to pay for real estate taxes, insurance premiums, maintenance or improvement of other real

estate described in a declaration." UCIOA § 1-103(7), 7 U.L.A. at 240 (1985). Common interest communities are those governed by UCIOA. UCIOA §§ 1-201, 1-204, 7 U.L.A. at 266 (1982).

7 COMMUNITY ASSOCIATIONS INSTITUTE FACTBOOK, 7-9 (1988) [hereinafter CAI FACTBOOK], (estimating 29,640,000 CIC residents some four years ago, which CAI considered to be 12.1% of population). Higher estimates exist, *See* Mike Bowler & Evan McKenzie, *Invisible Kingdoms,* 5 CAL. LAW. Dec. 1985, at 55. A 1987 California study estimates there were then between 13,000 and 16,000 owners' associations in that state alone. S. BARTON AND C. SILVERMAN, COMMON INTEREST HOMEOWNERS' ASSOCIATIONS MANAGEMENT STUDY: REPORT TO THE CALIFORNIA DEPT. OF REAL ESTATE 2 (1987) [hereinafter BARTON & SILVERMAN CALIFORNIA STUDY]. For extensive review of the emergence of restrictive promissory servitudes as a judicially favored legal device, see generally James L. Winokur, *The Mixed Blessings of Promissory Servitudes: Toward Optimizing Economic Utility, Individual Liberty and Personal Identity,* 1989 WIS. L. REV. 1 (1989) [hereinafter Winokur, *Mixed Blessings*].

8 *See Apartment/Condominium Market,* 27 NAT'L REAL EST. INVESTOR, 53, 60 (1986).

9 CAI estimates new common interest associations are being created at the rate of approximately 4,000-5,000 per year. In each of the 50 largest metropolitan areas throughout the U.S., well over 50% of all new housing has for several years now been in CIC housing. CAI FACTBOOK, *supra* note 7, at inside front cover. Estimates exist for the growth of CICs nationally. *See, e.g.,* Howe, *California's Homeowner Wars,* S.F. CHRON., July 3, 1989, at C-1; Homeowners' Association Task Force Report to Montgomery County Council, Rockville, Maryland (1989) at 12 (concluding that "virtually all subdivisions of 50 units or more are being developed as common interest communities and . . . in the near future the vast majority of our citizens will live under these quasi governments"); Stephen E. Barton & Carol J. Silverman, *The Political Life of Mandatory Homeowners' Associations, in* RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM? 31, 34 (U.S. Advisory Commission on Intergovernmental Relations, 1989) (noting servitude regimes account for over 90% of all new housing in San Jose, California).

10 New Jersey State League of Municipalities v. New Jersey, No. BUR-L-790-90 (Nov. 5, 1990) (recognizing such services as essentially public services, for which CIC residents are in effect double taxed, but holding New Jersey statute mandating reimbursement unconstitutional for failing to equally protect tenant victims of similar double taxation).

11 *See, e.g.,* DOWDEN, COMMUNITY ASSOCIATIONS: A GUIDE FOR PUBLIC OFFICIALS, 7-13 (1980); Robert H. Nelson, *The Privatization of Local Government: From Zoning to RCAs, in* RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM? 9, 18, 45, 47 (U.S. Advisory Commission on Intergovernmental Relations, 1989); Brentwood Subdivision Road Ass'n, Inc. v. Cooper, 461 N.W.2d 340, 342 (Iowa Ct. App. 1990); 61 Op. Cal. Att'y Gen. 466 (1978); Kenney, *Dictators of Taste,* EASTSIDE WEEK, October 2, 1991 (Seattle).

12 Although most associations, in a recent California study, believed their reserves were adequate to avoid large special assessments, a third of them had no completed study of their reserve needs on which to base their optimism. BARTON & SILVERMAN CALIFORNIA STUDY, *supra* note 7, at 21. To similar effect, *see also* STEVEN A. WILLIAMSON AND RONALD J. ADAMS, DISPUTE RESOLUTION IN CONDOMINIUMS: AN EXPLORATORY STUDY OF CONDOMINIUM OWNERS IN THE STATE OF FLORIDA 58 (1987) [hereinafter WILLIAMSON & ADAMS FLORIDA STUDY] (reporting only two-thirds of association officers questioned as being aware of any financial reserves maintained by the board). Suggesting a possible lack of adequate reserves, 30% of all associations in the California study had called for special assessments within the past two years. BARTON & SILVERMAN CALIFORNIA STUDY, *supra* note 7, at 20. About two-thirds of residents in the Florida study had already paid at least one special assessment in an average of about four and a half years of ownership. WILLIAMSON & ADAMS FLORIDA STUDY, at 52, table 30. In California, only 28% of the associations whose responses included reserve figures reported reserves at least equaling the 75% of annual expenses recommended by some industry experts. BARTON & SILVERMAN CALIFORNIA STUDY, *supra* note 7, at 20. *Compare* COMMUNITY ASSOCIATIONS INSTITUTE RESEARCH FOUNDATION, RESERVE TO PRESERVE (1984) [hereinafter RESERVE TO PRESERVE] (declining to set forth any general numerical guidelines, and suggesting that each association's ideal reserves amount would vary with, e.g., the remaining useful life of major common assets, their replacement costs, each association's size, etc.).

From a reserves survey of CAI member associations, RESERVE TO PRESERVE also reports that 4% of surveyed associations lacked any reserves, with an additional 4% having added nothing to their reserves in the immediately prior year. These figures represented improvements from five years earlier. The report praises the average responding associations as having both increased median reserves per association by 40%, and doubling reserves per unit between 1979 and 1982. RESERVE TO PRESERVE,

at 29. Figures for recent condominium conversions of older buildings were particularly troubling. Also, the report characterizes as a "serious financial management deficiency" that fewer than a third of all responding associations report having any written investment policy. Further, only 13% of volunteer self-managed associations have such a policy. *Id.* at 29. The 524 associations responding to this survey are likely unusually active in seeking training and in managing the associations, so that these results might understate reserves inadequacies in 1982. Arguably, reserves inadequacies will have become worse during the recessionary years since RESERVE TO PRESERVE was published. For additional recent expression of concern regarding adequacy of association reserves generally, see also *RCA Characteristics and Issues, in* RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM? 9-18 (U.S. Advisory Commission on Intergovernmental Relations, 1989).

13 While some association leaders are sophisticated and dedicated volunteers, or rely upon well qualified management companies, other boards are led by amateurs ill-equipped to provide the necessary financial management. The Barton & Silverman California Management Study portrays many board members as "not thoroughly knowledgeable about their own associations," and "mistaken as to the contents of their association documents." BARTON & SILVERMAN CALIFORNIA STUDY, *supra* note 7, at 12. Barton and Silverman give examples of a board member mistakenly believing a controversial city parking rule to be an association-administered rule and an association committee chairman unaware of the committee's task. *Id. See also* WILLIAMSON & ADAMS FLORIDA STUDY, *supra* note 12, at 68 (reporting 61.7% of responding condominium residents either "strongly agreeing" or "agreeing" that "[m]ost condominium officers lack the technical training to be effective managers"). *See also* CARL NORCROSS, TOWNHOUSES & CONDOMINIUMS: RESIDENTS' LIKES AND DISLIKES 80-85 (Urban Land Institute, 1973) [[[[hereinafter NORCROSS]; Uriel Reichman, *Residential Private Governments: An Introductory Survey,* 43 U. CHI. L. REV. 253, 290 (1976-1977) [hereinafter *Residential Private Governments*] (noting resident dissatisfaction with failure of developers to train association boards).

14 *See also* BARTON & SILVERMAN CALIFORNIA STUDY, *supra* note 7, at 22.

15 *See, e.g.,* ARIZ. REV. STAT. ANN. § 33-1256 (1989); CAL. CIV. CODE § 1367 (Deering 1990); FLA. STAT. ch. 718.116 (1989); GA. CODE ANN. § 44-3-109 (Michie 1989) (requiring some perfection for the association lien to be valid); HAW. REV. STAT. § 514A-90 (1990); I.R.S. 55-1518 (1988); MICH. COMP. LAWS § 559.208 (1990); N.Y. REAL PROP. LAW § 339-z (McKinney 1989); OHIO REV. CODE ANN. § 5311.18 (Anderson 1988); OR. REV. STAT. § 94.709 (1989); VA. CODE ANN. § 55-516 (Michie 1990); WIS. STAT. § 703.16 (1987-88).

16 Assuming no applicable provisions in either CIC declarations or state CIC statutes modify the result, the association's lien for assessments would normally take priority over interests recorded subsequently to the CIC declaration under the common law and the state recording acts. *See, e.g.,* Mendrop v. Harrell, 103 So. 2d 418, 424 (Miss. 1958); Prudential Ins. Co. v. Wetzel, 248 N.W. 791, 793 (Wis. 1933). This conclusion focuses on the recorded declaration as having created the association's assessment lien at an earlier date than mortgages against individual units.

17 For convenience, discussion of issues in this article potentially relating to both mortgages and deeds of trust will be discussed in terms of mortgages alone, with the understanding that the same substantive points made about mortgages are equally applicable to deeds of trust. For an overview of similarities and differences between deeds of trust and mortgages, *see, e.g.,* GRANT S. NELSON AND DALE A. WHITMAN, REAL ESTATE FINANCE LAW, § 1.5 (2d ed. 1985) [hereinafter NELSON & WHITMAN].

18 Statutes still following § 23(a) of the Federal Housing Administration Form # 3285: Model Statute for Creation of Apartment Ownership (FHA Model Act) (reprinted with commentary in NORMAN PENNEY, RICHARD BROUDE, ROGER CUNNINGHAM, LAND FINANCING: CASES & MATERIALS, 580-592 (3d ed. 1984) [[[hereinafter PENNEY]) provide that the association lien is subordinate to any "first mortgage of record." *See, e.g.,* VA. CODE § 55-79.85 (Michie 1990) (limiting subordination to first mortgages of institutional lenders). *See generally* NELSON & WHITMAN, *supra* note 17, § 13.5 at 965. Some other statutes place all mortgages ahead of the association assessment lien. *See, e.g.,* UTAH CODE ANN. § 57-8-20 (1990); Brask v. Bank of St. Louis, 533 S.W.2d 223 (Mo. Ct. App. 1975). For a state statute subordinating association assessment liens to all mortgages recorded before a given assessment, see OKLA. STAT. ANN. tit. 60, § 524 (West 1970).

19 Having been drawn up by developers with an eye toward assuring the future availability of financing, most declarations alter the common law/recording act priority by subordinating the assessment lien to first mortgages on individual units, and sometimes to all unit mortgages. Some declarations do so by providing that the assessment lien and its priority both date from an assessment's due date or from notice of an assessment default. *See, e.g.,* St. Paul Fed. Bank for Sav. v. Wesby, 501 N.E.2d 707, 711-12 (Ill. App. Ct.

1986), *appeal denied,* 508 N.E.2d 736 (Ill. 1987). Other declarations simply state the conclusion that association assessment liens are subordinate to first mortgages, so that the timing and recordation of the competing interests is not prerequisite to the priority result. *See, e.g.,* Damen Sav. & Loan Ass'n v. Johnson, 467 N.E.2d 1139 (Ill. 1984) (construing such a declaration). *See generally* ROBERT NATELSON, LAW OF PROPERTY OWNERS ASSOCIATIONS §§ 6.3.2, 6.3.3 (1989) [hereinafter NATELSON].

20 *See* BAXTER DUNAWAY, THE LAW OF DISTRESSED REAL ESTATE 13-12 (1987); ALLAN AXELROD, CURTIS BERGER & QUENTIN JOHNSTONE, LAND TRANSFER AND FINANCE: CASES AND MATERIALS 267, 269 (3d ed. 1986).

21 The foreclosure of a lender's senior lien usually wipes out the association's assessment lien. The lender who typically purchases at the sale will have no responsibility for any assessments which accrued prior to foreclosure. *See, e.g.,* First Fed. Sav. Bank of Georgia v. Eaglewood Court Condominium Ass'n, 367 S.E.2d 876, 880 (Ga. 1988). For a discussion of the lender who typically purchases at the sale, see *infra* note 29 and accompanying text. Assessments coming due during the foreclosure are unlikely to be collected from either the owner or lender, perhaps until the new unit owner receives the sheriff's deed at the close of any statutory redemption period. *See* Newport Condominium Ass'n v. Talman Home Fed. Sav. & Loan Ass'n, 545 N.E.2d 136 (Ill. App. Ct. 1988), *app. denied* 550 N.E.2d 558 (Ill. 1990). Astonishingly, recent authority is divided on whether a purchaser who does not expressly assume the assessment obligation--such as a foreclosure sale purchaser--becomes liable for assessments by virtue of its ownership, as with covenants running with the land generally. *Compare* Chateaux Condominiums v. Daniels, 754 P.2d 425, 427 (Colo. Ct. App. 1988) (purchaser on constructive notice becomes liable) *with* Century Park Condominium Ass'n v. Norwest Bank Bismark, N.A., 420 N.W.2d 349 (N.D. 1988) (no assumption by foreclosure sale purchaser, no liability).

22 *See* Kleine, *Interagency Condominium Task Force,* 1 SYMPOSIUM ON UNIFORM MULTIPLE OWNERSHIP ACTS 10-11 (Community Ass'ns Inst. Research Found., Joint Editorial Bd. for Real Property Acts of the Am. Bar Ass'n & Uniform Laws Conference, 1991) [hereinafter MULTIPLE OWNERSHIP ACTS SYMPOSIUM] (noting Federal Housing Authority's support for condominium financing beginning in 1961; Veterans Administration's support for PUDs beginning in 1968, and for condominiums in 1974; Federal National Mortgage Association's (FNMA) and the Federal Home Loan Mortgage Corporation (Freddie Mac) support for PUDs and condominium financing markets beginning around 1975).

23 *See* Zinman, *Condominium Investments and the Institutional Lender--A ReView, Symposium on the Law of Condominiums,* 48 ST. JOHN'S L. REV. 749, 754 (1974) (commenting on extra burden mortgagees face when they acquire units in foreclosure and find themselves now bound as owners by assessments that have become excessive). *See also* NELSON & WHITMAN, *supra* note 17, at 965.

24 Henry L. Judy and Robert A. Wittie, *Uniform Condominium Act: Selected Key Issues,* 13 REAL PROP. PROB. & TR. J. 437, 481 (1978) [hereinafter Judy and Wittie]. *See also* John W. Walbran, *Condominium: Its Economic Functions,* 30 MO. L. REV. 531, 554-55 (1965); Phillip J. Gregory, *The California Condominium Bill,* 14 HASTINGS L.J. 189, 204 (1963). *See also,* Inwood N Homeowners' Ass'n v. Harris, 736 S.W.2d 632, 635 (Tex. 1987).

25 Judy and Wittie, *supra* note 24, at 482 (arguing that disproportionate burdening of a decreasing base of solvent owners itself threatens ability of those owners to meet higher assessment bills, leading to increasing foreclosures).

26 *Id. See, e.g., House of Cards: The Rise and Fall of Denver's Housing Market; Recovery To Be Slow, Painful,* ROCKY MTN. NEWS, Nov. 12, 1989, at 22-23. Among the spillover consequences from the cycle of rising assessments and rising assessment defaults is the impact on public governments who have increasingly shifted their traditionally public governmental responsibilities to the community associations. Judy and Wittie, *supra* note 24, at 483.

27 *See* CAI FACTBOOK, *supra* note 7, at 7, 9 (estimating that 500 community associations existed in 1962, 20,000 in 1975, 55,000 in 1980 and 130,000 in 1988).

28 *See* RESERVE TO PRESERVE, *supra* note 12, at 30 (reporting in 1982 that average association was seven years old and already needing to consume reserves at rate of a dollar spent for each two dollars set aside for reserves in same year). Condominium conversion projects were using reserves even earlier in their existences, perhaps foreshadowing difficulties as other common interest communities age.

29 *See, e.g.,* ROBERT LIFTON, PRACTICAL REAL ESTATE: LEGAL, TAX AND BUSINESS STRATEGIES, 262, 263 (1979) [hereinafter LIFTON]; William C. Prather, *A Realistic Approach to Foreclosure,* 14 BUS. LAW. 132, 135 (1958).

30 *See, e.g.*, MICHAEL MADISON AND ROBERT ZINMAN, MODERN REAL ESTATE FINANCING 985 (1991); LIFTON, *supra* note 29, at 257.

31 *See* BAXTER DUNAWAY, *supra* note 20, at §§ 7.01, 7.02 (1987).

32 *See* NATELSON, *supra* note 19, at § 6.3.3; Judy and Wittie, *supra* note 24, at 496.

33 Notable exceptions include cooperatives and some condominiums, where their documentation requires association pre-approval of unit purchasers. Such restraints on alienation of units based on financial and sometimes compatibility criteria are often upheld if the creating documentation of the cooperative or condominium provide for such restraints. *See, e.g.*, Weisner v. Park Ave. Corp., 160 N.E.2d 720, 723 (N.Y. 1959). For a review of authorities, and a spirited argument favoring the validity of restraints against the sale of condominium and cooperative units, see VINCENT DI LORENZO, THE LAW OF CONDOMINIUMS AND COOPERATIVES, § 6-1-30 (1990). Arguments favoring such restraints, and the likelihood of the creating documentation containing such restraints, are stronger in the cooperative setting, where financial interdependence is often even greater than in condominiums due to the cooperative corporation's blanket mortgage, and where each resident owns a leasehold rather than fee estate. *See* NATELSON, *supra* note 19, 594-608.
Restraints on alienation of unit ownership are also more readily upheld when structured as a right of first refusal than as a flat prohibition. *See, e.g.*, Aquarian Found., Inc. v. Shalom House, Inc. 448 So. 2d 1166, 1169 (Fla. Dist. Ct. App. 1984); GARY A. POLIAKOFF, THE LAW OF CONDOMINIUM OPERATIONS §§ 4-74 to -78, -81, -82 (1988). While the right of first refusal better protects the economic position of the restricted owner, exercising it can be prohibitively expensive for the association where alternate buyers are not readily available. *Aquarian Found.*, 448 So. 2d at 1169. However, some courts are willing to allow the association to screen a potential purchaser before having to purchase (or provide another purchaser) under a right of refusal. *See, e.g.*, Coquina Club, Inc. v. Mantz, 342 So. 2d 112, 115 (Fla. Dist. Ct. App. 1977).

34 Judie and Wittie, *supra* note 24, at 496.

35 *Id.* at 494.

36 *Id.* at 475-76.

37 This article's endorsement of financially stronger community associations is not intended to endorse giving additional muscle to associations in their regulatory role of enforcing use restrictions within CICs. To the contrary, this author has written extensively on the harmful effects of aggressively enforcing such CC&Rs (covenants, conditions, and restrictions) in community associations. *See generally* Winokur, *Mixed Blessings, supra* note 7, at 48-75. For a discussion of community associations as unbridled and often abusive "shadow governments," see JOEL GARREAU, EDGE CITY: LIFE ON THE NEW FRONTIER 185-208 (1991).
In addition to strengthening associations' financial management, UCIOA imposes on CICs lacking architectural review restrictions a requirement that associations approve all changes to the external appearance of any unit. UCIOA § 2-111(2), 7 U.L.A. at 297 (1982). Such a statutory imposition of association control on individual unit owners is bad public policy. Even where architectural review provisions are expressed in CIC declarations, many homebuyers purchase units unaware of this limitation on their control of their own homes. *See* Winokur, *Mixed Blessings, supra* note 7, at 59 n.246. UCIOA's provision would potentially add to the number of surprised homebuyers even the relatively small segment of homebuyers who actually read declarations before buying into a common interest community. Accordingly, the new Colorado Common Interest Ownership Act omits this provision. *Compare* COLO. REV. STAT. § 38-33.3-211(b) (Supp. 1991).

38 UCIOA § 3-115, 7 U.L.A. at 525 (1982).

39 NATELSON, *supra* note 19, at 238-39; Judy and Wittie, *supra* note 24, at 482.

40 UCIOA § 3-102(a)(11), 7 U.L.A. at 326 (1982).

41 UCIOA § 3-102 cmt. 5, 7 U.L.A. at 326 (1982).

42 *See* the Colorado Common Interest Ownership Act, which includes within the association's powers recovery "of reasonable attorneys fees and other legal costs for collection of assessments and other actions to enforce the power of the association, regardless of whether or not suit was initiated." COLO. REV. STAT. § 38-33.3-302(1)(k) (1991). More generally, the Colorado Common Interest

Ownership Act provides rights to collection costs and attorneys fees caused by violation of UCIOA, or applicable declaration, bylaws, rules and regulations, with an award of collection costs and attorneys fees to the prevailing party on each such claim. COLO. REV. STAT. § 38-33.3-123 (1991).

43 Unlike fees, fines for violation of the declaration can be imposed only after notice and an opportunity to be heard. UCIOA § 3-102(11), 7 U.L.A. at 326 (1982). Therefore, associations governed by UCIOA will likely address lateness problems with standard fees rather than fines.

44 For reference, the text of UCIOA § 3-116(a) to -116(j)(4) is as follows:

Section 3-116. Lien for Assessments

(a) The association has a lien on a unit for any assessment levied against that unit or fines imposed against its unit owner from the time the assessment or fine becomes due. Unless the declaration otherwise provides, fees, charges, late charges, fines, and interest charged pursuant to Section 3-102(a)(10), (11), and (12) are enforceable as assessments under this section. If an assessment is payable in instalments, the full amount of the assessment is a lien from the time the first instalment thereof becomes due.

(b) A lien under this section is prior to all other liens and encumbrances on a unit except (i) liens and encumbrances recorded before the recordation of the declaration and, in a cooperative, liens and encumbrances which the association creates, assumes, or takes subject to, (ii) a first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent, or, in a cooperative, the first security interest encumbering only the unit owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent, and (iii) liens for real estate taxes and other governmental assessments or charges against the unit or cooperative. The lien is also prior to all security interests described in clause (ii) above to the extent of the common expense assessments based on the periodic budget adopted by the association pursuant to Section 3-115(a) which would have become due in the absence of acceleration during the 6 months immediately preceding institution of an action to enforce the lien. This subsection does not affect the priority of mechanics' or materialmen's liens, or the priority of liens for other assessments made by the association. (The lien under this section is not subject to the provisions of [insert appropriate reference to state homestead, dower and courtesy, or other exemptions]).

(c) Unless the declaration otherwise provides, if 2 or more associations have liens for assessments created at any time on the same property, those liens have equal priority.

(d) Recording of the declaration constitutes record notice and perfection of the lien. No further recordation of any claim of lien for assessment under this section is required.

(e) A lien for unpaid assessments is extinguished unless proceedings to enforce the lien are instituted within (3) years after the full amount of the assessments becomes due.

(f) This section does not prohibit actions to recover sums for which subsection (a) creates a lien or prohibit an association from taking a deed in lieu of foreclosure.

(g) A judgment or decree in any action brought under this section must include costs and reasonable attorney's fees for the prevailing party.

(h) The association upon written request shall furnish to a unit owner a statement setting forth the amount of unpaid assessments against the unit. If the unit owner's interest is real estate, the statement must be in recordable form. The statement must be furnished within [10] business days after receipt of the request and is binding on the association, the executive board, and every unit owner.

(i) In a cooperative, upon nonpayment of an assessment on a unit, the unit owner may be evicted in the same manner as provided by law in the case of an unlawful holdover by a commercial tenant, and the lien may be foreclosed as provided by this section.

(j) The association's lien may be foreclosed as provided in this subsection:

(1) In a condominium or planned community, the association's lien must be foreclosed in like manner as a mortgage on real estate [or by power of sale under [insert appropriate state statute§;

(2) In a cooperative whose unit owners' interests in the units are real estate (Section 1-105), the association's lien must be foreclosed in like manner as a mortgage on real estate [or by power of sale under [insert appropriate state statute§ [or by power of sale under subsection (k)]; or

(3) In a cooperative whose unit owners' interests in the units are personal property (Section 1-105), the association's lien must be foreclosed in like manner as a security interest under [insert reference to Article 9, Uniform Commercial Code.]

[(4) In the case of foreclosure under [insert reference to state power of sale statute], the association shall give reasonable notice of its action to all lien holders of the unit whose interest would be affected.]

UCIOA § 3-116, 7 U.L.A. at 351-52 (1982).

45 *Id.* § 3-116(a), 7 U.L.A. at 351 (1982). In the case of assessments payable in installments subject to the super priority, which will affect no more than six months of assessments and charges where only later installments are defaulted, the priority of the association

lien--as distinct from the moment the lien first attaches--will focus on the timing of the assessment delinquency. Therefore, accelerated installment payments will relate back to the date of the first default on an installment, and not to the date the first assessment is due. *Id.* § 3-116(b)(ii), 7 U.L.A. at 351 (1982). *See also* 1 GURDON H. BUCK, CONDOMINIUM DEVELOPMENT § 8:66, at 8-120 (1991).

UCIOA's installment provision threatens association recovery of assessments in the case where the lien for an assessment payable in installments is extinguished by foreclosure before all of the installments become due. Suppose, for example, a first mortgagee forecloses on a unit with a hitherto good assessment record, which has just recently become subject to an installment assessment obligation stretching over the coming 12 months. There already is a lien in the amount of the full 12-month installment assessment, pursuant to § 3-116(a)'s installment language. The mortgage foreclosure can thus extinguish whatever portion of this lien is not prioritized by § 3-116(b) as it would any junior lien. If the unit owner later defaults on several installments of the installment assessment, no statutory lien would remain available to support collection. On the other hand, where an early installment is in default, acceleration of assessments can be very valuable in affording the association a worthwhile recovery for enforcing after a relatively small default. *See* COMMUNITY ASSOCIATIONS INSTITUTE, COLLECTING ASSESSMENTS: AN OPERATIONAL GUIDE 11 (GAP Report 10, 1988).

Associations governed by UCIOA's § 3-116(a) should thus weigh carefully the pros and cons of levying assessments in installments. Unfortunately, some declaration provisions eliminate the choice by mandating that general assessments be levied as annual assessments payable in equal monthly assessments. Though the UCIOA's installment language may afford the association some advantage where it accelerates an installment assessment obligation, on balance the ability to enforce short-lived delinquencies might not be worth the potential loss of lien for later missed assignments. Arguably, UCIOA might better protect association interests by dating the lien from the date assessments, including installment payments, become due. *See, e.g.,* WASH. REV. CODE § 64.34.364(1) (1990).

46 UCIOA § 3-116(a), 7 U.L.A. at 351 (1982). Some state adoptions of § 3-116(a) expressly include attorneys' fees. *See, e.g.,* COLO. REV. STAT. § 38-33.3-316 (1) (1991); CONN. GEN. STAT. § 47-258 (1991).

47 UCIOA §§ 3-116(b)(i)-(iii), 7 U.L.A. at 527 (1982).

48 *Id.*

49 *Id.* § 1-104, 7 U.L.A. at 250 (1982).

50 The "super priority" lien for assessments over first mortgages and deeds of trust has thus far been adopted as part of the UCIOA in the following states: Alaska, ALASKA STAT. § 34.08.470 (1990); Colorado, COLO. REV. STAT. § 38-33.3-316 (1991); Connecticut, CONN. GEN. STAT. § 47-258 (1989); Nevada, NEV. REV. STAT. § 116.3116 (1991); West Virginia, W. VA. CODE § 36B-3-116 (1986). Essentially the same statutory lien priority provision has been adopted as part of the Uniform Condominium Act (UCA), applicable only to condominiums, in the following states: Pennsylvania, PA. CONS. STAT. ANN. § 5-3101 to -3414 (1990), Rhode Island, R.I. GEN. LAWS § 34-36.1-1.01 to 34-36.1-4.20 (1982). *But see* Act of March 9, 1992, ch. 8, 1992 R.I PUB. LAWS 8 (recently amending R. I. GEN. LAWS §34-36.1-3.16 (1991), cutting back the super priority from five years of assessments to six months) *Compare* WASH. REV. CODE § 64.34.364(3) (1991) (providing for the limited six-month assessment lien priority, except that (1) a mortgagee may reduce the six-month priority by up to three months of delay in the association's provision of a notice of delinquency where the mortgagee has previously asked for such notice from the association); WASH. REV. CODE § 64.34.364(4) (1991); WASH. REV. CODE § 64.34.364 (1991) (providing that the super priority for any portion of the lien is waived if it is foreclosed by non-judicial foreclosure). Washington, D.C. has adopted the super priority for assessment liens as part of a sweeping revision bringing its statute fairly closely in line with the UCA. *See* D.C. CODE ANN. § 45-1853 (1991). Several states have adopted the UCA without incorporating the "super priority" lien provisions. *See, e.g.,* ARIZ. REV. STAT. ANN. § 33-1201 (1990 & Supp. 1991); ME. REV. STAT. ANN. tit. 33, §§ 1601-101 to 1604-118 (West 1988 & Supp. 1991); MO. ANN. STAT. §§ 448.1-101 to 448.1-120 (Vernon 1986); NEB. REV. STAT. §§ 76-801, 76-874 (1990); N.M. STAT. ANN. §§ 47-7A-1 to 47-7D-20 (Michie Supp. 1991).

51 UCIOA § 3-116(b), 7 U.L.A. at 351 (1982).

52 The concept of splitting a single lien into two liens holding varying priority is not new to the law of land security. *See, e.g.,* National Bank of Washington v. Equity Investors, 506 P.2d 20, 23 (Wash. 1973), *appeal after remand,* 518 P.2d 1072, (Wash. 1974), *appeal after remand,* 546 P.2d 440 (Wash. 1976) (construction loan lien, securing future optional advances held partially senior and partially junior to intervening materialman's lien, based on which advances were made before materialman's lien attached); Middlebrook-

Anderson Co. v. Southwest Sav. & Loan Ass'n, 96 Cal. Rptr. 338, 341 (Dist. Ct. App. 1971) (subordination of seller's trust deed to construction loan lien deemed conditional, so that only part of construction lien takes priority).

53 *See supra* note 46.

54 UCIOA § 3-116(b), 7 U.L.A. at 527 (1982).

55 On this point, the Colorado statute prioritizes attorneys fees and enforcement costs, keeping them separate from, and unlimited by, the six-months assessment ceiling. COLO. REV. STAT. § 38-33.3-316 2(b)(II) (1991).

56 *See supra* text accompanying note 45. An interesting issue is posed by Denis Caron, whose treatise Connecticut Foreclosures (2d ed. 1989) is quoted in Anderson, Collection of Common Charges in Connecticut Common Interest Communities: An Analysis of the Application of the Super Priority Lien and Related Collection Remedies, 6-8 (1991) (unpublished paper). Assume a mortgage foreclosure is commenced with all assessments on the subject unit current. However, during the foreclosure the owner ceases all assessment payments. Eight months of assessment defaults follow. Are any of these delinquencies within the Prioritized Lien despite the fact that they involve assessments following commencement of foreclosure, in contrast to the "six months immediately preceding an action to enforce the lien" spoken of in § 3-116(b)? Because this reference to 6 months preceding foreclosure is merely a measure of the maximum Prioritized Lien, any and all assessment delinquencies regardless of when the assessment came due qualify for inclusion in the Prioritized Lien, as do other fines, charges, etc., but all only "to the extent of . . . assessments based on the budget . . . which would have become due in the absence of acceleration during the 6 months immediately preceding an action to enforce the lien." UCIOA § 3-116, 7 U.L.A. at 351 (1982). In her paper, Anderson reports that Connecticut courts, unsympathetic with lender arguments that no super priority attaches in this situation, acknowledges the approach sketched above, and incorrectly concludes herself that the association would receive a priority equal to six months of the actual missed assessments, regardless of the timing of the filing of the actions or the assessments budgeted before that action. Anderson, Collection of Common Charges in Connecticut Common Interest Communities: An Analysis of the Application of the Super Priority Lien and Related Collection Remedies, 8 (1991) (unpublished paper).

57 The UCIOA mandates a budgeting process in § 3-103(c), UCIOA § 3-103(c), 7 U.L.A. at 304 (1982). For a discussion of the budgeting process, see *infra* notes 150-54 and accompanying text.

58 UCIOA § 3-116(b), 7 U.L.A. at 527 (1982).

59 *Id.*

60 *See, e.g.,* COLO. REV. STAT. § 838-38-105 (Supp. 1991). *But see* WASH. REV. CODE § 64.34.364 (1991) (summarized *supra* in note 50).

61 *See, e.g.,* BAXTER DUNAWAY, *supra* note 20, at 12-9 (1991). *See also* Marion A. Marquis, *Statutory Redemption Rights,* 3 WASH. L. REV. 177, 185-86 (1928) (addressing the rule that a creditor may not exercise rights of statutory redemption after "his own" foreclosure sale)

[W]here a plaintiff by his complaint, and defendant or intervenors by cross-complaints, in one suit, seek foreclosure and execution sale in satisfaction of their mortgages or liens, and obtain a decree adjudging the amount due each, fixing the order of priority, ordering the property sold and distribution among the parties in the order of their rank, the sale is for and on behalf of each and all . . . even though the proceeds of the sale may be insufficient to pay the full amount due some.

See id. at 187-88, *cited with approval in* Seattle Medical Ctr. Inc. v. Cameo Corp., 339 P.2d 93, 96 (Wash. 1959). By this analysis, for the mortgagee's foreclosure to become the junior lienor's, action may require the junior answering the foreclosure complaint by a cross-claim praying foreclosure of their own lien. *See id.* Focusing on the form of a junior lienor's answer to being joined in the senior's foreclosure should be irrelevant, considering that the substantive results of the foreclosure will be unchanged regardless of whether the junior lienor actively cross-claims for foreclosure or merely appears and asks for application of the sale proceeds to its lien. Rather, all junior lienors participating in senior lienor foreclosures--including community associations holding junior assessment liens--should be treated as in an action to enforce their lien. Given the cited authority, however, associations might as well honor the formal distinction in their pleadings.

Rather than relying on such esoteric distinctions, however, UCIOA's § 3-116(b) should be clarified. Washington has a provision measuring the six months from the date of:

a sheriff's sale in an action for judicial foreclosure by either the association or a mortgagee, the date of a trustee's sale in a non-judicial foreclosure by a mortgagee, or the date of recording of the declaration of forfeiture in a proceeding by the vendor under a real estate contract.

WASH. REV. CODE § 64.34.364(3) (Supp. 1991). By measuring the six months from the date of a foreclosure sale, the Washington statute has the additional advantage of including within the lien priority an important period of frequent assessment delinquency. In considering whether junior liens are being enforced in senior lienor foreclosure actions, see 4 AM. LAW OF PROP. § 16.191 (Casner ed., 1952). Here, the late Professor Osborne's treatment reflects that the purposes of including a junior lienor in a senior lienor's foreclosures include allowing such junior to realize on its security much like the senior, except with a lower priority claim to the sale proceeds.

62 COLO. REV. STAT. ANN. § 38-33.3-316 2(b)(I) (Supp. 1991).

63 Other UCIOA sections treated as automatically applicable to existing associations include Separate Titles and Taxation (§ 1-105), Applicability of Local Ordinances, etc., (§ 1-106), Eminent Domain (§ 1-107), Construction and Validity of Declaration and Bylaws (§ 2-103), Description of Units (§ 2-104), Merger or Consolidation of CICs (§ 2-121), Powers of the Unit Owner's Association (§ 3-102(a)(1)-(6), (11)-(16)), Tort and Contract Liability (§ 3-111), Association Records (§ 3-118), Resale of Units (§ 4-109) and Effect of Violations of Rights of Action (§ 4-117). The definitions section is also applicable to the extent necessary in construing the applicable substantive provisions.

64 UCIOA § 1-204, 7 U.L.A. at 266 (1982).

65 *Id.*

66 UCIOA § 1-201, 7 U.L.A. at 264 (1982).

67 UCIOA § 1-206 leaves it unclear whether a preexisting CIC can elect to be treated as fully subject to UCIOA, as if it were a new CIC. UCIOA § 1-206, 7 U.L.A. at 269 (1982). The language of § 1-206 appears to permit such an election, if only by an amendment to the declaration incorporating the full UCIOA statute into the declaration. *Id.* However, Comment 6 to § 1-206 explicitly concludes that this section does not permit a preexisting community to elect to come entirely within the provisions of the Act. UCIOA § 1-206 cmt. 6, 7 U.L.A. at 269 (1982). The comment may be distinguishing between amendment of internal governance documents versus choice of applicable public law. However, it is unclear why an amendment incorporating the statute, or even a UCIOA variant, should not be permissible under UCIOA § 1-206. Comment 6 does suggest a daunting alternative--terminating the CIC under preexisting law and creating a new, post-UCIOA CIC. The biggest drawback to this suggestion is that, until UCIOA has become applicable, termination would require a unanimous vote of unit owners unless the declaration authorized termination of the CIC upon a lesser vote. *See* GERALD KORNGOLD, PRIVATE LAND USE ARRANGEMENTS, § 11.03 (1990). UCIOA replaces the unanimity requirement for termination with an 80% requirement. UCIOA § 2-118, 7 U.L.A. at 483 (1982).

Neither of these approaches for bringing a preexisting CIC under UCIOA triggers the rule that UCIOA's sections apply "only with respect to events and circumstances occurring after the effective date of this [Act] and do not invalidate existing provisions of the [declaration, bylaws, or plats and plans] of those common interest communities." UCIOA § 1-204, 7 U.L.A. at 266 (1982). That limiting language appears only in § 1-204 regarding applicability to preexisting CICs that have not opted in to UCIOA coverage. In these cases, UCIOA's "super priority" lien could arguably apply to preexisting loans secured by mortgages of units in CIC units which elect by amendment to be covered under UCIOA. Although application of the super priority in such circumstances might prove constitutional, the contrary argument would be far stronger where lenders unaware of UCIOA made loans in reliance on senior priority. For a discussion of the constitutionality, see *infra* notes 79-87 and accompanying text. Further, the fairness of so imposing the super priority against pre-UCIOA loans would certainly be questionable.

In Colorado, preexisting associations are afforded a statutory formula for electing treatment under the Colorado Common Interest Ownership Act. COLO. REV. STAT. § 38-33.3-118 (Supp. 1991) While the election, modelled after an analogous election in Colorado's non-profit corporation law, is far easier to accomplish than a full scale amendment of the declaration, its impact is expressly restricted. Specifically, the Colorado Act applies "only with respect to events and circumstances occurring on or after July 1, 1992, the effective date of this Act, and does not invalidate provisions of any [declaration, bylaws, or plats and plans] of those common interest communities." COLO. REV. STAT. § 38-33.3-118(5) (Supp. 1991).

68 UCIOA § 3-116(b), 7 U.L.A. at 351 (1985). For a discussion of priorities, see also *supra* note 51 and accompanying text.

69 For a discussion of priority imposed in condominium statutes, see *supra* note 50.

70 In at least some parts of the United States, these provisions appear frequently. For examples of types of such provisions, see *supra* note 18 and *infra* note 72.

71 UCIOA § 1-204, 7 U.L.A. at 266 (1982).

72 Where a subordination exists, its wording is frequently drawn from HUD-FHA Form 1400 Series, HUD-FHA Handbook 4135.1 Declaration, Article IV, Covenant for Maintenance Assessment, "Section 9. Subordination of the Lien to Mortgages" (REV 2 1981): "The lien of any assessment provided for herein shall be subordinate to the lien of any first mortgage." This language expressly limits the subordination to "the assessment provided for herein," and strengthens the argument that it would not address subordination of a UCIOA statutory assessment.

By contrast, language drawn from FHA 4150 (Rev.-1), Declaration, II (4) is more sweeping, and less helpful to the association in this context: "The lien of any assessment is subordinate to the lien of any first mortgage." Likewise, language drawn from VA Guideline 7(b) and VA Form 26-8201 contains language which likely includes the UCIOA assessment lien: "The lien of any assessment levied by the HOA must be subordinate to the lien of a first mortgage."

73 An analogous issue is created where a CIC's declaration expressly provides that notice of assessment liens shall be afforded by recording notices of default whenever a unit owner fails to pay assessments. This requirement is far more burdensome than the UCIOA requirement that "recording of the declaration constitutes record notice and perfection of the lien." UCIOA § 3-116(d), 7 U.L.A. at 351 (1982). Recording requirements applicable to the UCIOA statutory assessment lien are discussed *infra* in text accompanying notes 135-41. As suggested by the immediately preceding discussion of the priority provision in many CIC declarations, however, it will often be arguable that the perfection requirement applied only to the lien created by the declaration, and not to the UCIOA lien.

74 UCIOA § 1-204, 7 U.L.A. at 266 (1982).

75 *Id.*

76 The Random House Dictionary of the English Language defines "invalidate" as "to render invalid; to discredit; to deprive of legal force or efficacy; nullify." RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1003 (2d ed. 1987). *But see* UCIOA § 1-204 cmt. 3, 7 U.L.A. at 266 (1982) (embodying UCIOA's drafter's conservative position on UCIOA applicability). In contrast to the more limited "invalidation" language of the statute itself, Comment 3 states, "[M]oreover, the provisions of this Act are subject to the provisions of the instruments creating the common interest community, and this Act does not invalidate those instruments." UCIOA § 1-204 cmt. 3, 7 U.L.A. at 266 (1985). Use of the ambiguous term "invalidate" is one of several weaknesses in UCIOA's scheme for applying its terms to preexisting CICs. Another interpretive problem is determining the consequence of a UCIOA section being omitted from § 1-204's listing of sections applicable to preexisting communities. Thus, for example, even where the declaration of a pre-existing CIC is silent on the subject of insurance, a possible reading of § 1-204 is that the insurance requirements of § 3-113 are inapplicable. Section 1-204, Comment 2 suggests this result: "'[O]ld' law remains applicable to previously created common interest communities where not automatically displaced by [§ 1-204 of] the Act . . . . [[U]nder § 2-106, owners of 'old' common interest communities may amend any provisions of their declaration or bylaws, even if the amendment would not be permitted by 'old' law . . . . " UCIOA § 1-204 cmt. 3, 7 U.L.A. at 266 (1982). *See also* UCIOA § 1-204, 7 U.L.A. at 266 (1985) (relocation of boundaries per § 2-112 permitted only if association so amends its declaration). But as now drafted, no UCIOA language supports UCIOA's conservative comment by clearly mandating § 3-113's inapplicability, leaving a gap likely to generate litigation. Such drafting ambiguity should be eliminated by express specification of the consequences of omission of a section from § 1-204's list.

Another fundamental issue is whether constitutional considerations on the minds of the UCIOA drafters mandate that much of UCIOA should be inapplicable to preexisting associations--even with regard to post-UCIOA events and circumstances, and even where the declaration is silent. Granted, UCIOA's example of redrawing boundaries involves so tangible a change of property rights as to raise troubling questions of unconstitutional interference with contracts or property. But applying to preexisting associations corporate-regulatory sections like those addressing insurance, supra, executive board membership (§ 3-103), and meeting quorums (§ 3-108), arguably pose few constitutional problems. Indeed, even in the face of express provisions in the declaration, one might argue the validity of applying such corporate-regulatory provisions to preexisting associations.

Though incorporated associations differ in important respects from the classic for-profit corporation, *see, e.g.,* NATELSON, *supra* note 19, at 66-67, the validity of applying corporate-regulatory provisions of UCIOA to incorporated associations can be reinforced by reference to reserved corporate power provisions in state constitutions and statutes, which allow future changes in corporate regulations as part of the contract creating the corporation. *See, e.g.,* Brundage v. New Jersey Zinc Co., 226 A.2d 585 (N.J. 1967); McNulty v. W. & J. Sloane, 54 N.Y.S.2d 253 (N.Y. Sup. Ct. 1945). *See generally* HARRY G. HENN & JOHN R. ALEXANDER, LAW OF CORPORATIONS, 953-55 (1983). Therefore, in considering adoption or amendment of the statute, section-by-section review of the applicability provisions will likely generate several candidates for broader applicability than now provided in UCIOA. For discussion of the constitutionality of applying § 3-116 to "new" mortgage loans in "old" common interest communities, see *infra* notes 79-87 and accompanying text.

77 UCIOA § 1-204, 7 U.L.A. at 250 (1982).

78 Formally, notice to lenders derives from the new statute plus recorded declarations which UCIOA gives greater effect as imparting notice. As a practical matter, the lending and title communities will very likely become actually aware of UCIOA's lien priority provisions--including the new import of recorded declarations, and the lack of necessity for recorded delinquencies-- during the legislative process. At the latest, lenders will learn of the new provisions when they begin transacting under the new statute. On the other hand, notice to new mortgagees of properties in preexisting CICs could be further clarified by use of more precise language for resolving differences between UCIOA's provisions and those of declarations in communities where new loans are made.

79 The contracts clause states: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. CONST. art. I, § 10.

80 *See* UCIOA § 1-204, cmt. 3, 7 U.L.A. at 250 (1982).

81 It has been argued in other contexts that enactment of UCIOA's "super priority" lien would prejudice unit owners' ability to obtain financing. This argument appears to be without merit. *See infra* text accompanying note 155. It might also be asserted that unit owners' relationships with their mortgage lenders are of greater personal importance to the owners because such lenders influence availability of future credit. Therefore, the unit owners might have an interest in their mortgage lender holding top priority so that they are most likely to be paid in hard times. This interest seems far too tenuous and subjective to render application of the UCIOA lien priority scheme unconstitutional. *Id.*

82 As noted above, mortgage lenders whose loans precede the enactment of UCIOA will not be subject to the "super priority" lien under the conservative applicability provisions of § 1-204. If UCIOA's drafters had attempted to bind such pre-UCIOA lenders, they might well have been successful. Granted, in that case, the pre-UCIOA lenders could have a somewhat stronger claim for invalidating application to them of UCIOA's "super priority" lein. Arguably, CIC declaration provisions addressing lender rights (to priority; to notice of delinquency; to notice of proposed declaration amendments, etc.) create third party beneficiary rights, vested in each mortgagee from the moment it takes CIC property as security in reliance on the declaration. *See generally* E.A. FARNSWORTH, CONTRACTS 709-44 (1982). However, even with retroactivity established, it is questionable whether UCIOA's "super priority" lien's impact would be deemed sufficiently substantial to violate the U.S. Constitution's contracts clause. *See supra* notes 79-80 and accompanying text.

83 *See, e.g.,* JOHN NOWAK AND RONALD ROTUNDA, CONSTITUTIONAL LAW 404 (4th ed. 1991).

84 *See* Texaco, Inc. v. Short, 454 U.S. 516, 529 (1982); Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 244-45, *reh'g denied,* 439 U.S. 886 (1978).

85 *See, e.g.,* W. B. Worthen Co. v. Kavanaugh, 295 U.S. 56, 59 (1935). *See also* NOWAK AND ROTUNDA, *supra* note 83, at 405-06.

86 *See* Keystone Bituminous Coal Assoc. v. DeBenedictus, 480 U.S. 470, 503 (1987).

87 *See* Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 250, *reh'g denied,* 439 U.S. 886 (1978). The broad, generalized economic or social problem requiring a remedial approach such as UCIOA's "super priority" lien are addressed *supra* at notes 22-37.

88 Useful discussion of these priority questions in the context of the Uniform Condominium Act appears in Judy and Wittie, *supra* note 24, at 501. *See also* the FHA Model Act, *supra* note 18, on which many state statutes were based, providing the association lien priority over all liens but first liens, presumably including mechanics' liens. These generalized condominium statutes may be expressly superseded in the adoption of UCIOA. This might be less likely with respect to those state statutes specifically according

mechanics' liens priority over assessment liens. *See* IDAHO CODE § 55-1518 (1989); N.C. GEN. STAT. § 47A-22(a) (1991); WIS. STAT. ANN. § 703.23(1)(a) (1991).

89 Useful general discussion of attachment and priority of mechanics' liens appears in NELSON & WHITMAN, *supra* note 17, at § 12.4.

90 The priority setting discussed here is for the Less-Prioritized Lien, and not for the Prioritized Lien.

91 The due date and delinquency date will often be virtually the same date, as where an assessment due on the first of each month becomes delinquent that night at midnight. However, some declarations contain provisions postponing delinquency until later in the month when payment was first due.

92 Like a first mortgage, a mechanics' or materialmen's lien also is excepted from the general rule of assessment lien priority relating back to filing of the declaration. So, analyzing assessment lien priority similarly as against both mechanics' liens and first mortgages echoes a theme already sounded in § 3-116.

93 *See* NELSON & WHITMAN, *supra* note 17, at 955 n.50, for the contrary view that, under UCIOA, a mechanics' lien's priority would depend on comparison of the relation-back date of the mechanics' lien with the date the declaration was recorded.

94 UCIOA § 3-116(j), 7 U.L.A. at 352 (1982).

95 UCIOA § 3-116 (j)(1) (2), 7 U.L.A. at 352 (1982). Excepted from this treatment are cooperatives where the unit owners' interests are personalty. UCIOA § 1-105, 7 U.L.A. at 253 (1982). As to such cooperatives, foreclosure is governed by Article 9 of the Uniform Commercial Code. For cooperatives treated as real estate under UCIOA § 1-105, optional UCIOA § 3-116(k) sets forth a speedier foreclosure method, patterned after the Uniform Land Transactions Act, available as an alternative to each state's power of sale statute. *See* UCIOA § 3-116, cmt 4, 7 U.L.A. at 354 (1982).

96 Perhaps slightly more than half the states have statutes permitting foreclosure by power or, in a few cases, even statutorily creating the power of sale. Jack Jones and J. Michael Ivens, *Power of Sale Foreclosure in Tennessee: A Section 1983 Trap,* 51 TENN. L. REV. 279, 293-94 (1984). However, the power of sale foreclosure predominates only in about 18 states. *See* LIFTON, *supra* note 29, at 263; PENNEY, *supra* note 18, at 413. Though few state statutes actually prohibit the power of sale foreclosure, this more efficient method appears only to be used where a regulatory statute is applicable to legitimate the process, and the resulting title. *Id.*

97 *See, e.g.,* COLO. REV. STAT. § 38-33.3-316(11)(a) (Supp. 1991); COLO. REV. STAT. § 38-39-101 (1982 & Supp. 1991).

98 Power of sale foreclosure has been shown to cost substantially less in time and money than judicial foreclosure. *See, e.g.,* Josephine McElhone & Randall P. Cramer, *Loan Foreclosure Costs Affected by Varied State Regulations,* MORTGAGE BANKER, Dec. 1975, at 41; *The Costs of Mortgage Loan Foreclosure: Some Recent Findings,* 8 FED. HOME LOAN BANK BD. J. No. 6, at 7 (June, 1975).

99 *See* Judy and Wittie, *supra* note 24, at 516.

100 *Id.* at 515.

101 *See* Anderson, *supra* note 56, at 5.

102 Power of sale foreclosures tend to produce less stable titles. *Compare* NELSON & WHITMAN, *supra* note 17, at §§ 7.18, 7.20. For an example, in the context of CICs, of title uncertainties leading to unavailability of title insurance, see Jackson, *Homeowners Associations: Remedies to Enforce Assessment Collections,* L.A. BAR J. 423, 434 (1976).

103 *See, e.g.,* Northrip v. Federal Nat'l Mortgage Ass'n, 527 F.2d 23, 24 (6th Cir. 1975).

104 Wittie, *Origins of the Community Association's Special Lien Priority for Unpaid Assessments Under the Uniform Acts,* MULTIPLE OWNERSHIP ACTS SYMPOSIUM, *supra* note 22, at 171, 174 (noting importance of supporting association's lien priority by "an effective, low cost remedy," and calling right to enforce its lien through power of sale "potentially the most important remedy for the association"). *See also,* Judy and Wittie, *supra* note 24, at 516.

105 One conceptual difficulty in forcing the Prioritized Lien into the first mortgagee's sale would be that, technically, there is no way to calculate the amount of the Prioritized Lien until an action to enforce the assessment lien has been commenced. *See infra* text at note 120. Though UCIOA's language is less than clear on this point, the first mortgagee's foreclosure should also be considered an action to enforce the assessment lien, once any portion of the assessment lien (here, the Less-Prioritized Lien) has been included in the foreclosure. *See supra* text at note 61.

Even assuming that the Prioritized Lien is in existence for a sum certain, foreclosing junior liens generally have no power to force foreclosure upon holders of senior liens. *See generally* NELSON & WHITMAN, *supra* note 17, at § 7.14. An exception to the senior's right to stay out of the junior's foreclosure permits joinder of the senior for the informational purposes of determining the amount and priority of his lien. *Id.* Where, as here, the debt secured by the senior lien is already due and payable, some authority would allow the junior lienor to force the senior lienor in on the theory that the foreclosure will effect a redemption of the senior lien from the proceeds of the junior lienor's foreclosure sale. *Id.* at 516. However, the better view is that the senior "should be allowed to exercise his own judgment as to the time to foreclose." EDGAR DURFEE, CASES ON SECURITY 204 (1951). *Compare* NELSON & WHITMAN, *supra* note 17, *with* GRANT NELSON & DALE WHITMAN, REAL ESTATE TRANSFER, FINANCE & DEVELOPMENT: CASES & MATERIALS (3d ed. 1987) (the casebook suggesting weaker authority for the view that the senior can be forced in). For a recent argument that the junior should be permitted to force in senior interests, see David G. Carlson, *Simultaneous Attachment of Liens on After-Acquired Property,* 6 CARDOZO L. REV. 505, 530-34 (1985).

106 "Survival" of the Prioritized Lien assumes it has come into existence by inclusion of the Less-Prioritized Lien in the first mortgagee's foreclosure, arguably an "action to enforce" the association's lien. UCIOA § 3-116(b), 7 U.L.A. at 3512 (1982). *See supra* notes 61, 105, and *infra* text at note 120. If the Prioritized Lien is interpreted as not having come into existence at the time of the foreclosure, all assessment delinquencies would fall into the Less-Prioritized Lien, which is not limited to any period before commencement of any assessment lien foreclosure. *See* UCIOA § 3-116, 7 U.L.A. at 351-54 (1982).

Just in case its Prioritized Lien did not come into existence by virtue of the junior mortgagee's foreclosure, the association can be sure it has a Prioritized Lien to be paid off upon resale by triggering a Prioritized Lien, initiating its own foreclosure action even after the first mortgagee's foreclosure extinguishing the Less-Prioritized Lien. Since UCIOA does not limit the Prioritized Lien securing delinquent assessments except by the six-month measurement, delinquencies secured by the Less-Prioritized Lien extinguished in the earlier foreclosure and left unpaid by that foreclosure would be eligible for inclusion on the Prioritized Lien activated by the association's action to enforce its lien. *See* UCIOA § 3-116, 7 U.L.A. at 351-54 (1982). Despite initial appearances, this would not give the association too many chances to realize on security for its assessments. Because of statutory technicalities in defining the Prioritized Lien, the super priority rendered artificially unavailable at the first mortgagee's foreclosure finally would be recognized as available at the subsequent association foreclosure.

107 *See* 24 C.F.R. § 200.155 (1991).

108 *See* 38 C.F.R. § 36.4320 (h)(5) (1991).

109 It generally causes no problem if the foreclosing lienor wishes to include in the foreclosure a *junior* lien which would normally be required to foreclose under a different method. *See, e.g.,* COLO. REV. STAT. ANN. § 38-38-103 (Supp. 1991) (permitting joinder of mortgages in foreclosure of senior deeds of trust despite the fact that, per COLO. REV. STAT. ANN. § 38-39-101 (Supp. 1991), mortgages in Colorado can otherwise only be foreclosed judicially). However, such statutes typically make no provision for participation by *senior* lienor in a junior lienor's foreclosure.

110 *See, e.g.,* NELSON & WHITMAN, *supra* note 17, § 7.12.

111 *See, e.g.,* Boulder Lumber Co. v. Alpine of Nederland, Inc., 626 P.2d 724, 728 (Colo. Ct. App. 1981) (affirming injunction prohibiting public trustee from proceeding with deed of trust foreclosure where mechanics' lien holder was seeking judicially to foreclose against same security, and where priority disputes among lienors left respective parties' rights particularly unclear).

Even where priorities are clear, however, the simultaneous pursuit of a judicial and a non-judicial foreclosure against the same land will produce confusing results, considering the overlap of parties with interests standing to be extinguished in both proceedings. For an example of the type of confusion resulting from dual foreclosures, see the classic decision in Murphy v. Farwell, 9 Wis. 102 (1859).

112 For a discussion of a foreclosing junior mortgagee's vulnerability to a senior lienor's judicial foreclosure, see *supra* note 111 and accompanying text.

113 For the lender's position, see *supra* note 21 and accompanying text.

114 The threat of judicial foreclosure in states making nonjudicial foreclosure unavailable to the association would be particularly worrisome to a mortgagee. *See supra* note 96.

115 Comment 1 to UCIOA § 3-116 predicted: "As a practical matter, secured lenders will most likely pay the 6 months' assessments demanded by the association rather than having the association foreclose on the unit." *See also* Judy and Wittie, *supra* note 24, at 484.

116 *See, e.g.,* Judy and Wittie, *supra* note 24, at 481.

117 *See, e.g.,* Shipp Corp. v. Charpilloz, 414 So. 2d 1122, 1123 (Fla. Dist. Ct. App. 1982), where the court explained: "When the phrase ['right of redemption'] is used with reference to a junior mortgagee, it refers to his right to satisfy a prior mortgage by payment of the debt it secures and thereby become equitably subrogated to all rights of the prior mortgagee."

118 *See* NELSON & WHITMAN, *supra* note 17, § 7.3.

119 *Id.* § 7.2.

120 UCIOA § 3-116(b), 7 U.L.A. at 351 (1982).

121 *Id.*

122 *Id.*

123 *Id.* § 3-116(e), 7 U.L.A. at 351 (1985).

124 A puzzling problem for this strategy is to determine how long the agreement not to foreclosure the Prioritized Lien should last. Any finite time shorter than the remaining term of the first mortgage would leave that mortgage potentially susceptible to future foreclosure by the senior Prioritized Lien. A duration running until foreclosure of the first mortgage could leave the association without a crucial assessment remedy for a very long time, assuming there was still a substantial term remaining on the first mortgage.

125 The "assignment" characterization, with the notion of thereby keeping the Prioritized Lien alive, is the suggestion of Professor Dale Whitman. *See* Letter from Professor Dale A. Whitman (Feb. 5, 1992) (on file with author).

126 On the other hand, non-recognition of such an assignment might well create a more desirable incentive for the lender to pay off the entire assessment lien.

127 UCIOA § 1-104, 7 U.L.A. at 250 (1982). In so broadly prohibiting waiver or variation by agreement, § 1-104 stands in contrast to many statutes governing commercial transactions, where waiver is often expressly permitted at least under circumstances suggesting legitimate bargaining between the parties. *Compare, e.g.,* UNIF. LAND TRANSACTIONS ACT, § 1-103 (1977), and UNIF. COM. CODE, § 1-102(3) (1991) (allowing variation by agreement of the parties from the UCC's terms, except where specifically prohibitted, so long as duties of good faith, diligence, reasonableness and care are not disclaimed). *See also* RESTATEMENT (SECOND) OF PROPERTY, § 5.6 (1977) (permitting variation even of lessor's habitability obligations, depending on both procedural and substantive fairness, and consistency with applicable statute's underlying public policy). Considering the regularity with which legislatures, the Uniform Laws Conference and Restatements permit variation by agreement, UCIOA's contrasting provision in § 1-104, once adopted legislatively, should be strictly interpreted as consciously intended to prohibit variation of UCIOA rights, thereby to protect the fundamental policies underlying UCIOA.

In the case of an attempted purchase of the Prioritized Lien, the mortgagee could argue that the variation in rights under § 3-116 was valid because it had been purchased for adequate consideration. However, the term "agreement" itself, describing a prohibitted transaction under § 1-104, seems to contemplate consideration paid and that such payment would not validate a waiver or variation of UCIOA's terms. *Compare* Shearson American Express, Inc. v. McMahon, 482 U.S. 220, 230 (1987) (interpreting in dictum the anti-waiver provisions in § 29(a) of Federal Securities and Exchange Act to prohibit negotiation of commission reduction for waiver of disclosure protection of Exchange Act even when customer does so voluntarily and knowingly, and emphasizing irrelevance of evenness of such bargain). A variant of the mortgagee's adequate consideration argument would be that no UCIOA right had been varied; rather a right, the Prioritized Lien, had been purchased. As noted in the text, however, the Prioritized Lien would technically not yet exist at the time the mortgagee purported to purchase it. Practically speaking, what would be purchased under

such an assignment arrangement would be not only the association's ability to collect on delinquencies currently secured by the Prioritized Lien, but also its right to future lien priority for assessments on into the future. Taking that right from the association, even for substantial consideration, could vary UCIOA's basic assessment collection mechanism on a semi-permanent basis. UCIOA § 1-104 could not have meant to permit such disruption of the statutory scheme.

Purchase of an assignment of the perpetually renewable Prioritized Lien also raises very difficult problems of valuing the lien for purposes of determining adequacy of consideration. After all, such valuation would come at a time when the immediate amount of Prioritized Lien is unknown. Likewise, because the assignment of lien would run over time, during which the lien in the association's hands would have been renewable, a valuation would need to take into account what would have been changing amounts for the Prioritized Lien, and the possibility of the Prioritized Lien being used to recover varying sums in forclosure several different times. Even if value could be determined, these elements of value would clearly total a sum well in excess of the approximate amount of the Prioritized Lien at the one time the mortgagee was seeking to acquire an assignment.

128 The analogy made here between community associations and public governments in the limited realm of assessment collection is not intended to suggest a broader analogy between associations and public governments in general. One consequence of such a general analogy would be application of the Constitution to the actions of community associations. While the application of some constitutional safeguards to associations might be wise, such as protection of free speech from association interference, others such as one person one vote, would upset the fundamental structure of community associations as we know them. At best, such changes would require very careful consideration, and would generate very substantial difficulties in determining new association governance rules and in protecting owners' reliance interests. Accordingly, my recommendation has been for states to select the constitutional protections they consider appropriate to apply in community associations, and to provide for such protections statutorily. For further discussion, see Winokur, *Mixed Blessings, supra* note 7, at 65 n.271, 88.

129 *See supra* notes 10-11 and accompanying text. Community association's expenses are often even more varied than those of public municipalities, including not only municipal-type expenses (like private road maintenance) and otherwise essential expenses (like casualty insurance premiums), but also expenses which seem neither municipal-like nor essential (such as some recreational expenses)--nor necessarily entitled to priority over all other liens. However, these classifications are fraught with definitional ambiguity, as in the case of expenses to maintain a swimming pool, which is arguably both recreational and municipal-like. Because of the definitional complexities in distinguishing between more crucial and less crucial expenses, the drafters of UCIOA opted to include all duly levied CIC assessments, regardless of purpose, within the limited lien priority afforded to assessment liens by § 3-116. *See generally* Judy and Wittie, *supra* note 24, at 484-88. Similarly, the assessment and lien provisions do not inquire beyond the general budgeting process into the details of association governance or possibly poor association judgment in levying a particular judgment. Rather than examine each of these subtle variables in each case, § 3-116 begins with the fundamental compromise of limiting the association's priority to six months worth of assessments rather than giving the association first priority for all its assessments as municipal taxes receive.

130 Judy and Wittie, *supra* note 24, at 475.

131 *See* NELSON & WHITMAN, *supra* note 17, § 12.7.

132 For a discussion of first mortgagees paying assessment defaults, see *supra* notes 112-17 and accompanying text.

133 Buck, *Super Priority Liens for Community Associations,* 1 SYMPOSIUM ON UNIFORM MULTIPLE OWNERSHIP ACTS, *supra* note 22, at 153, 155: "From our own practical experience in dealing with the "super priority" lien in Connecticut, collections have indeed been much easier. Lenders have paid the assessments. More often, lenders have made the delinquent owner pay the assessments." Mr. Buck also notes that the onset of economic depression in the northeast U.S. has left lenders more reluctant to pay the Prioritized Lien. *Id.*

134 *See supra* text accompanying *supra* note 107.

135 UCIOA § 3-116(d), 7 U.L.A. at 351 (1982).

136 In some states, the perfection requirement is expressed statutorily. *See, e.g.,* N.C. GEN. STAT. § 47C-3-116(a) (1984). *See also* GARY POLIAKOFF, LAW OF CONDOMINIUM OPERATIONS ASSOCIATIONS § 5.26 (1988). Elsewhere, perfection has evolved as a rule of practice, with trial courts occasionally insisting upon it.

137 This issue becomes even more slippery where a recorded delinquency is cured, but the unit owner becomes delinquent again. Will the first notice perfect the lien as to the later delinquency which should, in fairness, have been cancelled on the record but which may not have been?

138 Declarations sometimes supplement their assessment lien provisions with language requiring perfection of the assessment lien by filing individual unit delinquencies. In the case of associations in existence before enactment of UCIOA, conservative association counsel may elect to follow the dictates of the declaration regardless of the liberating provisions of UCIOA. However, it is at least arguable that such provisions in the declaration would be inapplicable to control UCIOA's statutory lien. *See supra* note 73 and accompanying text.

139 This assessment status reporting system is described and critiqued *infra* notes 142-49.

140 The required contents of a declaration are set forth in UCIOA § 2-105, which does not require any provision for either assessments or assessment liens. UCIOA § 2-105, 7 U.L.A. at 280 (1982). Assessments are restricted by UCIOA § 3-115. UCIOA § 3-115, 7 U.L.A. at 349 (1982). Many pre-UCIOA association declarations do contain express association lien provisions, which may subordinate the association lien's priority to one or more mortgages, and which may specify perfection of the association lien by recording unit delinquencies. For a discussion of the consequences of these provisions in jurisdictions enacting the UCIOA, see *supra* notes 71-74 and accompanying text.

141 WASH. REV. CODE ANN. § 61.24.040(1)(a)(ii) (1990). *Compare* COLO. REV. STAT. 38-38-101(7)(a) (Supp. 1991) (similar notice requirements). Beyond the notice of foreclosure provided for in COLO. REV. STAT. § 38-38-101, however, the Colorado statutory scheme also provides for an additional notice of right to cure and right to redeem to all parties holding such rights. COLO. REV. STAT. § 38-38-103 (1990). The right to cure extends to parties such as "any holder of an interest junior to the lien being foreclosed by virtue of being a lienor . . . under a recorded instrument." COLO. REV. STAT. § 38-38-104 (1990). The Washington deed of trust foreclosure scheme apparently contains no analogous provision.

142 UCIOA § 3-116(h), 7 U.L.A. at 352 (1982).

143 For a discussion of management problems, particularly with amateur association boards lacking financial and business expertise, see *supra* note 13 and accompanying text.

144 This would include both the Prioritized and the Less-Prioritized Lien.

145 A unit owner's personal liability for unpaid assessments due during that owner's ownership of a unit is well established. *See* NATELSON, *supra* note 19, at 222. It is also implicitly recognized in UCIOA's grant of power to the association "to collect assessments . . . from unit owners." UCIOA § 3-102(2), 7 U.L.A. at 326 (1982). *See also* THE HOMES ASSOCIATION HANDBOOK, TECH. BULL. 50, 324-27 (Urban Land Institute, 1964) (extensive though inconclusive argument that personal assessments should be available); PENNEY, *supra* note 18, at 541; FHA Form 1401 (VA Form 26-8201), HUD-FHA Handbook 4135.1 § 1; COLO. REV. STAT. § 38-33.3-315(6) (Supp. 1991) (clarifying that unit owner's liability for payment of assessments persists despite any waiver of use of common elements or abandonment of unit). *But see* Century Park Condominium Ass'n v. Norwest Bank Bismark, 620 N.W.2d 349, 352 (N.D. 1988) (no personal liability or assumption of assessment obligations by foreclosure sale purchaser). Generally, liability of a unit owner should not extend to assessments coming due after a unit owner transfers title to the unit to a successor. *But see* NATELSON, *supra* note 19, at 222; RESTATEMENT OF PROPERTY, § 538 (1944) (continuing obligation of promisor after parting with land ownership depends on intention manifested in making covenant); Korngold, *supra* note 67, at 331.

146 Compare Colorado's recently adopted version, which provides vaguely that, when the association fails to respond to a proper request for an assessment status report, "it shall have no right to assert a priority lien upon the unit for unpaid assessments which were due as of the date of the request." COLO. REV. STAT. § 38-33.3-316(8) (1991) (emphasis added). The term "priority lien" leaves unclear whether it is merely the Prioritized Lien which no longer secures the unreported assessments, or whether these assessments have also lost the security of the Less-Prioritized Lien. Since even the Less-Prioritized Lien does have statutory priority under UCIOA over mortgages junior to the first mortgage but filed after the declaration, this Less-Prioritized Lien could conceivably be within the term "priority lien." This unfortunate language was the product of last-minute, political compromise.

147 For a discussion of the perpetually renewable Prioritized Lien, see *supra* text following note 117.

148 *Id.* To assure that each association has a registered agent, and to encourage what many practitioners consider good practice, Colorado's entire lien for assessments provision is conditioned on the association being incorporated. COLO. REV. STAT. § 38-33.3-316(1) (Supp. 1991).

149 COLO. REV. STAT. § 38-33.3-316(8) (Supp. 1991).

150 UCIOA § 3-115(a), 7 U.L.A. at 349 (1982).

151 UCIOA § 3-116(b), 7 U.L.A. at 351 (1982).

152 UCIOA § 3-103(c), 7 U.L.A. at 328 (1982).

153 Regarding the need for better financial planning by many community associations, see *supra* note 12 and accompanying text.

154 For authorities reporting outrageous and disruptive behavior by community association members, *see, e.g.,* Winokur, *Mixed Blessings, supra* note 7, at 63 n.263.

155 For example, in Colorado the realtors and developers supported enactment of the statute, including the "super priority" lien while title insurers and the Real Estate and Titles Section of the Colorado Bar Association opposed its enactment. In Connecticut and Washington, the Bar supported the legislation. Realtors in Colorado and Alaska supported enactment of UCIOA, but Realtors opposed enactment in Connecticut. Lenders were part of the coalition which supported enactment in Connecticut, as indeed the Federal Home Loan Mortgage Corporation had helped sponsor development of the UCIOA "super priority" lien in the first place. Note, for example, that Henry Judy (whose article so strongly supporting "super priority" lien is cited throughout this Article) was and remains Freddie Mac General Counsel and was Advisor to the Special Committee drafting the UCIOA. However, lenders specifically opposed the "super priority" lien in Colorado, even succeeding in having it temporarily removed from the bill before the Colorado Senate voted to specifically add the lien provisions back into the bill.

156 FEDERAL NATIONAL MORTGAGE ASSOC. SELLING GUIDE, Part VIII, ch. 6, § 608.02 (Rev. June, 1990); 1 FEDERAL HOME LOAN MORTGAGE CORP. SELLERS SERVICERS' GUIDE, § 2003(c), 2005(c). As noted in Comment 1 to UCIOA § 3-116, there has also been some concern that the "super priority" lien would run afoul of state regulations restricting lending institutions to mortgages which are "first" liens. *See, e.g.,* CAL. FIN. CODE § 7102 (Deering 1989); N.Y. BANKING LAW § 380(4) (Consol. 1990); TEX. REV. CIV. STAT. ANN., art. 852(a), § 5.05 (West 1964 & Supp. 1992). *See also* Alfred V. Contarino & Richard O. Kiner, *Control and Management of Common Elements by Covenant,* 14 HASTINGS L.J. 309, 314 (1963); Russell R. Pike, *The Condominium as a Mortgage Investment,* 14 HASTINGS L.J. 282, 286 (1963). To date, such statutes have not been asserted to inhibit mortgage loans secured by CIC units--perhaps following the lead of federal regulators and recognizing how widespread the market is in which the six-month super priority is recognized.

157 The FNMA provision is limited to situations where the declaration requires that assessments be paid monthly. FEDERAL NATIONAL MORTGAGE ASSOC. SELLING GUIDE, Part VIII, ch. 6, § 608.02 (Rev. June, 1990). The Freddie Mac provision contemplates that a mortgagee who obtains title to a unit will be liable for up to 6 months of assessments. 1 FEDERAL HOME LOAN MORTGAGE CORP. SELLERS SERVICERS' GUIDE, §§ 2003(c), 2005(c). As discussed in *supra* notes 107-10 and accompanying text, mortgagee payment of the six-month delinquency is likely at this stage anyway.

The contrast between the Fannie Mae and Freddie Mac provisions on acceptability of mortgages subject to the "super priority" lien echoes the contrasting positions of the Department of Housing and Urban Development and the Veterans Administration on whether mortgagee payment of the six-month delinquency will be covered under claims under HUD mortgage insurance or the VA. While HUD has taken the position that such payments are covered, the VA contends that they are not, citing its statutory restriction of VA loans to first liens only. *See* FEDERAL NATIONAL MORTGAGE ASSOCIATION MEMORANDUM TO ALL FHA/VA SELLER/SERVICERS (West Va.) (Nov. 18, 1980). FNMA, however, assures that VA guaranteed mortgages may be subject to the "super priority" lien provided adequate assurance is provided to FNMA that it will be held harmless with respect to prioritized assessments. *Id.*

There is some current concern regarding whether these various agencies might change their view on the acceptability of first mortgages subject to the "super priority" assessment lien. *See, e.g.,* Buck, *Super Priority Liens for Community Associations,* 1 MULTIPLE OWNERSHIP ACTS SYMPOSIUM, *supra* note 22, at 153, 157; Buck, *1991-92 Legislative Update, in* 13TH ANNUAL COMMUNITY ASSOCIATION LAW SEMINAR MATERIALS, 384, 395 (CAI, 1992). However, the number and size

of jurisdictions with versions of the "super priority" lien now in effect may, as a practical matter, effectively mandate continuation of the agencies' present acceptance of this limited super priority.

158 *See* Buck, *Super Priority Liens for Community Associations,* 1 MULTIPLE OWNERSHIP ACTS SYMPOSIUM, *supra* note 22, at 153, 156 (developers' and association attorney addressing experience both in Connecticut and nationally); Letter from Norman H. Roos, Connecticut Mortgage Bankers Association counsel to Charles H. Rhyne (regarding Connecticut experience) (on file with author); Letter from Robert M. Diamond, Esq., Virginia developers' counsel to Gurdon H. Buck (Feb. 26, 1991) (regarding Virginia experience); Telephone Interview with Mary Burt, Manager of State Relations, Government & Industry Relations, Federal Home Loan Mortgage Cokrporation (March 16, 1992). *See also* letter from Mary Burt, Manager of State Relations, Government & Industry Relations, Federal Home Loan Mortgage Corporation, to Hon. Bruce G. Sundlun, Governor of Rhode Island (Oct. 18, 1991) (arguing for repeal of Rhode Island's 1991 passage of a five-year super priority for association liens, and impliedly accepting and advocating the six-month super priority provisions of the Uniform Acts as in keeping with Freddie Mac's nationwide uniform standards) (on file with author).

159 UCIOA § 2-107(b), 7 U.L.A. at 466 (1985); *See also* UCIOA § 3-115(a), 7 U.L.A. at 525-27 (1982).

160 Wittie, *Origins of the Community Association's Special Lien Priority for Unpaid Assessments Under the Uniform Acts,* MULTIPLE OWNERSHIP ACTS SYMPOSIUM, *supra* note 22, at 171, 173. *See also* UCIOA § 3-116 cmt. 1, 7 U.L.A. at 529 (1982).

161 Wittie, *supra* note 160, at 173.

162 Buck, *Super Priority Liens for Community Associations,* MULTIPLE OWNERSHIP ACTS SYMPOSIUM, *supra* note 22, at 153, 155. In Connecticut, where UCIOA became effective January 1, 1984, Mr. Buck reports that escrows have been required only after the lender has already once been forced to pay off delinquent assessments in an enforcement action. *Id. See also* NELSON & WHITMAN, *supra* note 17, at 965-66 (suggesting as an explanation for their non-use that administration costs for assessment escrows are particularly high due to more frequent payouts than assessments for taxes and insurance, but nonetheless favoring their use). *Compare* THE HOMES ASSOC. HANDBOOK, *supra* note 145, at 232 (reporting long before Uniform Laws Conference promulgation of UCIOA or UCA that 21 of 71 associations questioned maintained assessment escrows).

163 For estimates of the age of community associations, see *supra* note 27.

164 For a discussion of the transfer of governmental responsibilities to community associations, see *supra* notes 11-12 and accompanying text.

165 For a discussion of the impact on neighboring CIC units of unpaid assessments, see *supra* notes 24-26 and accompanying text.

166 *See* Letter from Harry L. Paulsen, Exec. Dir. Land Title Assoc. of Colorado, to Senator Bill Schroeder (March 7, 1991) (on file with author).

167 UCIOA § 3-116(a), 7 U.L.A. at 351-52 (1985).

168 *See* American Land Title Association (A.L.T.A.) Residential Owners Policy, Form B (1970), Exclusion 3 (D); A.L.T.A. Loan Policy, Form 1970, Exclusion 3 (D). The same exclusion in Plain Language Form P-1979 makes clear the title insurance company's liability for mechanics' liens for work and materials prior to issuance of the policy. When addressing individual cases in Connecticut (a UCIOA state), and not the merits of UCIOA as legislation, title companies have themselves asserted this same argument: "that creation of the lien is a post-policy occurrence and not covered." *See* letter from Gurdon H. Buck, Esq., to James L. Winokur (Jan. 3, 1992) (on file with author). Though Mr. Buck does not consider this conclusion to be "self-evident," he reports title companies generally succeed in so denying liability for assessment defaults occurring after issuance of a title policy. *Id.* Mr. Buck's concern is apparently based in the Form 4 (and Form 5) endorsements. *Id.*

169 A.L.T.A. Condominium Endorsement Form 4; A.L.T.A. PUD Endorsement Form 5.

170 A.L.T.A. Condominium Endorsement Form 4.

171 A.L.T.A. PUD Endorsement Form 5.

172 The PUD endorsement is a bit less susceptible to this reading because, unlike the condominium endorsement, it does not expressly include within its coverage an assessment lien created by statute.

173 D. BARLOW BURKE, LAW OF TITLE INSURANCE 83 (1986). "[T]he insurer will indemnify the policy holder only if the title is otherwise than as stated as of the date of issuance. Both on-record and off-record risks arising after that date are not covered by the policy." *Id.*

174 1 GURDON BUCK, CONDOMINIUM DEVELOPMENT § 8:66, at 8-117 (1991).

175 *See supra* text at notes 142-49.

176 *Cf.* 1 GURDON BUCK, CONDOMINIUM DEVELOPMENT § 8:66, at 8-121 (1991).

177 UCIOA § 1-204, 7 U.L.A. at 266 (1985).

End of Document

Exhibit B

Proposed Revision to Subsection 47-258(b) of the Common Interest Ownership Act to Clarify the Association's Priority Lien

Proposed deletions are shown [in brackets]. Proposed additions are underlined.

(b) A lien under this section is prior to all other liens and encumbrances on a unit except

(1) liens and encumbrances recorded before the recordation of the declaration and, in a cooperative, liens and encumbrances which the association creates, assumes or takes subject to,

(2) a first or second security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent, or, in a cooperative, a first or second security interest encumbering only the unit owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent, and

(3) liens for real property taxes and other governmental assessments or charges against the unit or cooperative.

In each and every action brought to foreclose a lien under this section[1] or a security interest described in subdivision (2) of this subsection,[2][T]the lien is also prior to all security interests described in subdivision (2) of this subsection to the extent of

(A) an amount equal to the common expense assessments based on the periodic budget adopted by the association pursuant to subsection (a) of section 47-257 which would have become due in the absence of acceleration during the twelve [six] months immediately preceding institution of an action to enforce either the association's lien or a security interest described in subdivision (2) of this subsection and

(B) the association's costs and attorney's fees in enforcing its lien.

A lien for any assessment or fine specified in subsection (a) of this section shall have the priority provided for in this subsection in an amount not to exceed the amount specified in subparagraph (A) of this subsection. This subsection does not affect the priority of mechanics' or materialmen's liens or the priority of liens for other assessments made by the association.

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[1] This phrase refers to the association's lien for unpaid assessments, etc.

[2] This phrase refers to first and second mortgages.